87-583

No.

Supreme Court, U.S.
FILED
OCT 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,
Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court's power to vacate arbitration awards which contravene public policy empowers the court to overturn an arbitral decision which neither construes the agreement in a manner that would make the agreement unlawful nor directs the employer to take any action prohibited by law?

2. Whether a federal court's power to vacate arbitration awards which do not "draw their essence" from the collective bargaining agreement empowers the court to overturn an arbitral decision on the ground that the court disagrees with the arbitrator's conclusion that the language of a collective bargaining agreement is open to interpretation and with the arbitrator's reliance on extrinsic evidence of the parties' intent in construing that language?

3. If the answer to either question is "yes," what are the limits of the courts' power to vacate arbitration awards on these grounds?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: **Page**

Arco-Polymers, Inc. v. Local 8-74, 671 F.2d 752 (3rd Cir. 1982) 13, 14
Autoworkers Local 342 v. TRW, Inc., 402 F.2d 727 (6th Cir. 1968) 13
Detroit Coil v. Machinists, 594 F.2d 575 (6th Cir. 1979), *cert. denied*, 444 U.S. 840 8
Dobbs, Inc. v. Local 614, International Brotherhood of Teamsters, 813 F.2d 85 (6th Cir. 1987) 16, 17
Fireman and Oilers Local 935-B v. Nestle Co., 630 F.2d 474 (6th Cir. 1980) 12, 13, 15
F. W. Woolworth Co. v. Miscellaneous Warehousemen, 629 F.2d 1204 (7th Cir. 1980) 14, 15
Kewanee Machinery v. Teamsters Local 21, 593 F.2d 314 (8th Cir. 1979) 15, 17
Misco Inc. v. United Paperworkers International, 768 F.2d 739 (5th Cir. 1985), *petition for cert. granted*, No. 86-651 ..... 9, 10
Mistletoe Express Service v. Motor Expressmen's Union, 566 F.2d 692 (10th Cir. 1977) 13, 15
Morgan Services, Inc. v. Local 323, Chicago and Central States Joint Board, 724 F.2d 1217 (6th Cir. 1984) 12
S. D. Warren v. United Paperworkers International Union, Local No. 1069, 815 F.2d 178 (1st Cir. 1987) 1
Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) 10, 18
Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 10, 11, 18
Steelworkers Trilogy, 363 U.S. 564, etc. (1960) 10, 17, 18, 19
Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960) 10, 18
Super Tire Engineering Co. v. Teamsters Local Union No. 676, 721 F.2d 121 (3rd Cir. 1983) 14
Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1961) 19

TABLE OF AUTHORITIES—Continued

	Page
Teamsters Local 863 v. Egg Producers, 773 F.2d 530 (3rd Cir. 1985)	14
Waverly Mineral Products Co. v. Steelworkers, 633 F.2d 682 (5th Cir. 1980)	15
W. R. Grace & Company v. Rubber Workers, 461 U.S. 757 (1983)	11
STATUTES:	
Labor-Management Relations Act of 1947, 29 U.S.C. 151 *et seq.*:	
§ 203(d), 29 U.S.C. § 173(d)	2
§ 301(a), 29 U.S.C. § 185(a)	2
MISCELLANEOUS:	
F. Elkouri & E. Elkouri, *How Arbitration Works* (4th ed. 1985)	7
2 Bureau of National Affairs, *Labor Relations Cumulative Digest and Index, 1971-75* (1976)	19
2 Bureau of National Affairs, *Labor Relations Cumulaitve Digest and Index, 1981-85* (1986)	19

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v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the First Circuit in *S. D. Warren Company v. United Paperworkers International Union, Local No. 1069*, 815 F.2d 178 (1st Cir. 1987).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 815 F.2d 178, and is reprinted as Appendix A, pp. 1a-19a, to the separately bound Appendix to this Petition for a Writ of *Certiorari* ("Pet. App."). The opinion of the United States District Court for the District of Maine is reported at 632 F. Supp. 463, and is reprinted at Pet. App. 22a-38a. The arbitrator's award is unreported, and is reprinted at Pet. App. 39a-98a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 31, 1987. A timely petition for rehearing was denied on May 14, 1987. (Pet. App. 20a.) On July 22, 1987, Justice White signed an order extending the time for filing a petition for writ of *certiorari* to and including September 11, 1987. (Pet. App. 98a.) On August 24, 1987, Justice Brennan signed an order further extending the time for filing a petition for writ of *certiorari* to and including October 9, 1987. (Pet. App. 99a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. § 173(d), provides:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

STATEMENT OF THE CASE

Petitioners United Paperworkers International Union, Local 1069 ("the Union") and respondent S.D. Warren Co. ("the Company") were, at all times relevant herein, parties to a collective bargaining agreement covering the

production and maintenance employees at the Company's paper mill in Westbrook, Maine. The collective bargaining agreement provided a typical grievance and arbitration procedure for resolution of disputes between the parties.

On February 15, 1984, the Company discharged the three employees whose grievances gave rise to the instant case: Kimberly Denis, Debra Graham, and Linda Willoughby. The Company alleged that each employee had violated Mill Rule 7, which is part of the collective bargaining agreement, and which provides in part as follows:

> 7. Cause for Discharge
>
> • • •
>
> Violations of the following rules are considered causes for discharge:
>
> (a) Possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs.

The Rule goes on to list thirteen other offenses which also "are considered causes for discharge" including smoking in unauthorized areas, destruction or removal of Company property, insubordination, disorderly conduct, dishonesty, sleeping on duty, and violation of certain safety rules.

The Union filed a grievance over each discharge alleging in each case that the Company lacked "proper cause" as required by two separate provisions of the collective bargaining agreement.[1] Under the auspices of the American Arbitration Association, the parties selected Arbitrator Suzanne Gwiazda to render a final and binding decision. Following an eight-day hearing (spanning a period of four months), and after receiving post-hearing briefs, the Arbitrator rendered her 41 page decision and award.

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[1] Article 4 of the collective bargaining agreement provides that the Company retains the right "to . . . discipline, suspend or discharge employees for proper cause." The seniority provision of the contract in turn provided that mill seniority would end upon "discharge for proper cause."

The underlying facts as found by the Arbitrator are as follows. Each discharge was based upon events involving the discharged employee and a Company-employed undercover agent named Al Berry. Although the facts leading to each termination varied to some extent, the Arbitrator found that Berry befriended the grievants, each of whom was a beleaguered female employee working in an all-male area of the mill; that in each case Berry persistently attempted to induce the grievant to provide him with marijuana; and that each grievant resisted Berry's entreaties for a period of time but finally relented and provided Berry with a small amount of marijuana. (*See* Pet. App. 45a-47a.)

For example, the Arbitrator found that Berry approached Willoughly from eight to twelve times in the eight to twelve week period she knew him, and an additional four times on January 30, 1984 alone, on each occasion requesting that Willoughly furnish Berry with marijuana. Willoughby refused each request until, on Berry's last approach, she gave him a small amount of marijuana, refused payment, and told him to leave her alone. (Pet. App. 91a.) Similarly, Denis refused Berry's approaches on three occasions, but finally agreed to act as a "go-between" to attempt to find marijuana for Berry from another employee. (*Id.* at 84a-86a.) Graham refused Berry's requests at least six or seven times before selling him four grams of marijuana. (*Id.* at 88a.)

In each instance, the Arbitrator found that, while the employees had violated the Company rule against possession or sale of marijuana on mill property, their offenses did not constitute "proper cause" for discharge, as required by the collective bargaining agreement. Rather, the Arbitrator held that the Employer could properly suspend the employees for periods of time varying between four and nine months depending upon the nature of the particular employee's offense. (Pet. App. 39a.)

The Arbitrator began by addressing the question of whether, as the Company contained, Mill Rule 7 unambiguously "provides for immediate discharge" for any violation of that Rule. The Arbitrator rejected that contention on several grounds.

First, the Arbitrator looked to the language of the Rule and found that it is not "plain." The Arbitrator stated:

> Granted Section 7 of the Mill Rules is titled "Causes for Discharge," but there is no verb used. It does not say whether such causes "*will* be" or "*may* be" grounds for termination. [Pet. App. 66a.]

The Arbitrator concluded that this ambiguity was resolved by the language of the Company's own "Safety Policy handbook" which provided that the violation of certain rules—including Rule 7(a)—"*may* mean immediate discharge." The Arbitrator reasoned:

> Inasmuch as the safety booklet is a unilateral statement of Company policy, not a negotiated agreement with the Union, the Company had full opportunity to state that violations of [Rule 7 (a)] *will* mean immediate discharge. Instead, it chose to retain discretion over such decisions by using the word "may." In so choosing, it allowed a third party neutral the same discretion when reviewing the propriety of these decisions. [Pet. App. 67a; emphasis added.]

In addition to the contract language, the Arbitrator relied upon the past practices of the parties to conclude that they never intended that Mill Rule 7 would grant to the Company the unreviewable right to impose immediate discharge for any violation of the Rule.[2] The Arbitrator reviewed each of the examples of disciplinary actions contained in the record, involving some forty-one instances of Rule 7 violations and numerous other types

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[2] The Company itself insisted that the Arbitrator was authorized to base her award upon past practice. (*See* Pet. App. 68a.)

of infractions, and concluded that virtually all violations of mill rules over the years had been penalized with something less than discharge. Numerous Rule 7 infractions were met with verbal warnings, while others resulted in written warnings and suspensions of between one day and six months. The longest suspensions on record (six months) involved two employees who embezzled $25,000. In the only two previous Rule 7(a) infractions identified in the record, involving possession of alcohol, the employees were not discharged but placed in the employee assistance program. In only two previous cases—both involving incarceration for serious crimes—had the Company imposed discharge for Rule 7 violations. As the Arbitrator summarized, "[i]f any pattern emerges from an examination of past practice where Mill Rule 7 violations are concerned, it is the Company's consistent effort to help employees redeem themselves before they suffer the loss of their jobs." (Pet. App. 69a.)

Having rejected the Company's contention that under the collective bargaining agreement a violation of Rule 7(a) *ipso facto* constitutes "proper cause" for discharge, the Arbitrator proceeded to consider whether, on the facts of these cases, such cause was established. The Arbitrator stated the following general approach to that question:

> * * * [D]rug activity in the workplace must be viewed as very serious misconduct, but I can find no contractual justification for penalizing it with workplace execution while employees who have engaged in other forms of serious misconduct are merely fined with suspensions or are slapped on the wrist with warnings. Under the proper cause provision, the Company has the right to discipline employees who violate Mill Rules, including the right to discharge where necessary, but the discipline must be reasonably even-handed to be fair or "proper." [Pet. App. 83a-84a.]

After considering all of the surrounding circumstances with respect to the grievants' situation and their deal-

ings with Berry, the Arbitrator concluded that the discharges "were excessively harsh in light of past disciplinary practice for similarly serious Mill Rule 7 violations." (*Id.* at 96a.)[3] The Arbitrator left the grievants with "[h]eavy suspensions" ranging from four to nine months to "impress upon the grievants the seriousness of their misconduct," but, persuaded that the grievants "fully realize this now and will return to work with the determination to be productive employees which motivated them in the first place," the arbitrator overturned the discharges. (*Id.* at 96a.)[4]

Despite its contractual agreement that "the decision of the arbitrator shall be final and binding on the parties," the Company refused to comply and brought this action to vacate the award. Upon cross motions for summary judgment, the District Court denied the Company's motion and enforced the award, holding that the Arbitrator's interpretation drew its essence from the collective bargaining agreement and could not be disturbed. (*Id.* at 22a-38a.)

The United States Court of Appeals for the First Circuit reversed. That court advanced two alternative grounds for its decision.

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[3] Although the Arbitrator noted a number of mitigating circumstances of the type which arbitrators universally consider relevant in just-cause cause—such as the grievants' prior service and work record, the fact that they were induced to misconduct by company agents, and the pressure under which the grievants were working, *see* F. Elkouri and I. Elkouri, *How Arbitration Works* 679-87 (45th ed. 1985)—the Arbitrator placed her principal reliance on the Company's own past disciplinary practice. The court below is therefore wrong in suggesting that the Arbitrator's decision rests on "extenuating circumstances." (*See* Pet. App. 4a.)

[4] The Arbitrator sustained the discharge of a fourth grievant, Marshall Buhelt, who had urged Berry to use marijuana at work; the Arbitrator concluded that this offense was different in kind than the misdeeds of the other three grievants.

Proceeding from the premise that the arbitrator's task is solely to " 'construe ambiguous contract language,' " Pet. App. 8a, *quoting Detroit Coil v. Machinists*, 594 F.2d 575, 579 (6th Cir. 1979), *cert. denied*, 444 U.S. 840—and that the court's own view of "logic, reason and sound principles of contract law" must prevail over those of an arbitrator, Pet. App. 7a—the court of appeals took it upon itself "to see if the contract was ambiguous," Pet. App. 11a. That court decided, in disagreement with the Arbitrator, that the meaning of the contract is plain: "*We disagree* that Mill Rule 7(a) was so ambiguous that it took away from the employer the exclusive right to determine the punishment to be imposed for violation of that clause." *Id.* at 5a (emphasis added). The court below further concluded that the Arbitrator had misconstrued that contract: "[*W*]*e conclude* that the parties at the bargaining table had a meeting of the minds, that in cases of possession, use or sale of marijuana on company property, the employer had a right to discharge." *Id.* at 12a (emphasis added). The court of appeals elaborated:

> By incorporating Mill Rule 7(a) . . . the parties had the intention of allowing one of them, the employer in this case, to determine the nature of the punishment: the maximum of discharge on the first offense or no penalty. Otherwise, the parties would have remained mute and the pretention of this arbitrator as to interpretation of this clause would be valid. . . . We should not be inclined to conclude that what they agreed upon is ambiguous, for that would be splitting hairs to find a way to thwart the contractual will. On the contrary, we should find that the contract has a regular, logical meaning.
>
> * * * *
>
> The arbitrator refused to consider the plain meaning of the words that the parties agreed upon. Under these circumstances, the imposition by the arbitrator of a punishment the parties did not bargain for does not draw its essence from the collective bar-

> gaining agreement and such a construction is not the one the parties bargained for. [Pet. App. 14a, 18a.]

As a second and alternative basis for its holding, the court of appeals concluded that the "arbitration award cannot be enforced as a matter of public policy." Pet. App. 15a. That court reasoned that "there is a well-defined public policy against the use of drugs in the workplace," *id.* at 16a, and that even though the Arbitrator had found that the grievants did not use marijuana at work and would not do so if reinstated, the arbitral award nonetheless contravened this policy. In reaching this conclusion the court below expressly concluded that it is free to set aside an arbitral award on public policy grounds even where the award does not violate positive law, *id.* at 17a-18a; in this regard the First Circuit specifically relied on (*id.* at 18a) the Fifth Circuit's decision in *Misco Inc. v. United Paperworkers International*, 768 F.2d 739 (5th Cir. 1985), which this Court has granted a writ of certiorari to review (No. 86-651).

REASONS FOR GRANTING THE WRIT

The decision below rests on two alternative grounds. One of those two grounds—that the arbitration award is contrary to public policy—raises precisely the same issue that is presently pending before this Court for plenary review in No. 86-651, *Paperworkers v. Misco*: whether a court may set aside an arbitral award as contrary to public policy where the collective bargaining agreement, as interpreted by the arbitrator, is consistent wtih positive law. The court below, like the Fifth Circuit in *Misco*, was of the view that the courts have such an authority; indeed the court below specifically relied on the Fifth Circuit's decision in *Misco* in so doing.

The union in *Misco* is pressing the proposition that the public policy exception to the general rule favoring enforcement of labor arbitration awards is limited to awards that conflict with positive law. Should this Court

sustain that proposition and overturn the Fifth Circuit's *Misco* decision, this first supporting leg for the decision below in this case would fall as well.

The other leg on which the decision below rests is the proposition that where a collective bargaining agreement requires "cause" for discharge and also defines "dischargeable" conduct, arbitrators are required to interpret the agreement as granting the employer an unfettered and unreviewable discretion to decide whether to discharge an employee committing a "dischargeable offense" no matter what the bargaining history, past practice and the facts and circumstances surrounding the offense may show. That proposition has generated a square and irreconcilable conflict among the seven courts of appeals which have confronted the question. Because provisions defining certain acts as cause for discharge are quite common in collective bargaining agreements, the disagreement among the circuits as to the legal effect to be given such provisions is, in and of itself, of great practical importance to the development of the law of labor contracts.

Moreover, the conflict among the circuits on this specific question of labor law reflects a more fundamental divergence of opinion as to the respective role of arbitrators and courts in interpreting collective bargaining agreements. This Court addressed that issue some two decades ago in the *Steelworkers Trilogy*,[5] but over time the appellate courts have arrived at quite different understandings of the *Trilogy*'s lessons. That disagreement threatens the national labor policy favoring arbitration as the means to resolve labor-management disputes, and requires review by this Court.

A. The principles which federal courts are to follow in reviewing labor arbitration awards were announced

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[5] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

by the Court in *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 596, 599 (1960):

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. . . .
>
> • • •
>
> [P]lenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. . . . [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his. [Citations omitted.]

This broad deference which courts must accord an arbitration award, *Enterprise* goes on to say, is subject to a narrow exception:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's awards manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. [*Id.* at 597.]

The Court has often reaffirmed these principles, most recently in *W. R. Grace & Company v. Rubber Workers*, 461 U.S. 757 (1983), but has done so without specifying how the lower courts are to proceed in determining whether a particular award draws its "essence" from the collective bargaining agreement. The result is that

those courts are proceeding in markedly different ways and their irreconcilable decisions jeopardize the arbitral system and the ability of the parties to rely on the finality of arbitral awards.

B. The conflicting approaches of the court of appeals is revealed graphically by the conflicting decisions the appellate courts have rendered on the precise issue raised by this case: whether an arbitration award holding a discharge to be in breach of contract "draws" its essence" from the contract where the agreement contains a provision stating that the ground which the employee was discharged "constitutes [or shall constitute] cause for discharge." *Seven circuits* (including the First Circuit in the instant case) have confronted that very issue in recent years, and have divided 4-3 in their answer.

In concluding that the arbitral award before it was unenforceable, the court below relied on the Sixth Circuit's decision in *Firemen and Oilers Local 935-B v. Nestle Co.*, 630 F.2d 474 (6th Cir. 1980). That case involved a collective bargaining agreement which provided that certain specified offenses (including "incompetency, insubordination, or failure to perform satisfactorily"), "shall constitute cause for the dismissal of any employee from the service of the company." *Id.* at 475. The arbitrator there found that, while the grievant had refused direct orders from his foreman, the employer nevertheless did not have cause to discharge. The arbitrator therefore ordered the employer to reinstate the employee, but without backpay. The Sixth Circuit vacated the award. The Court concluded that the agreement "is clear and unambiguous" and "*needs no interpretation*" and that under the (supposedly) plain meaning of the contract the arbitrator was not empowered "to decide that discharge is too severe a penalty for the insubordination which he found." *Id.* at 476-77 (emphasis in original). *See also Morgan Services, Inc. v. Local 323, Chicago and Central States Joint Board*, 724 F.2d 1217 (6th Cir. 1984);

Autoworkers Local 342 v. TRW, Inc., 402 F.2d 727 (6th Cir. 1968).[6]

In *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977), which the court below also cited approvingly, the Tenth Circuit reached a similar conclusion. The agreement in question there provided that "employees may be discharged in just cause, among which just causes are the following: . . . (G) failure to settle bills and funds collected for the Company within twenty-four (24) hours." *Id.* at 693-94. The arbitrator ruled that while the employee had violated the rule, discharge was an excessive penalty. The Court vacated the award stating, "We find no ambiguity in the use of 'may' rather than 'will'. The provision gives the employer the option to discharge or not. The employer exercised the option and discharged [grievant]." *Id.* at 695.

In stark contrast to the decisions of the First, Sixth and Tenth Circuits, the Third, Fifth, Seventh and Eighth Circuits have held that federal courts may not overturn arbitration awards of the type involved here. *Arco-Polymers, Inc. v. Local 8-74*, 671 F.2d 752 (3rd Cir. 1982) is illustrative of this latter set of decisions. The collective bargaining agreement in that case contained a "just cause" provision and a provision stating that employees committing certain offenses "shall be subject to discharge". The arbitrator ruled that "just cause" was lacking for the grievant's discharge even though the grievant had committed a "dischargeable offense." The

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[6] The arbitrator in *Nestle Co.* actually "made no specific findings" as to whether the grievant's conduct constituted "insubordination" within the meaning of the collective bargaining agreement. 630 F.2d at 477. The Sixth Circuit held, however, that the facts as found by the arbitrator "constituted insubordination as a matter of law." *Id.* The court based that conclusion on the definition of insubordination contained in Black's Law Dictionary. *Id.*

Third Circuit enforced that award, explaining (*id.* at 753):

> [A]n arbitrator's award "draws its essence from the collective bargaining agreement" if:
>
> > the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award. [*Ludwig Honold Mfg. Co. v. Fletcher.* 405 F.2d 1123, 1128 (3rd Cir. 1969).]
>
> As described by Professor Gorman, this standard requires only "minimal rationality" of the arbitrator's decision.[7]

Similarly, in *F. W. Woolworth Co. v. Miscellaneous Warehousemen*, 629 F.2d 1204 (7th Cir. 1980), the Seventh Circuit enforced an arbitration award which overturned a discharge of an employee whom the arbitrator found had committed a "technical violation" of a company rule. The collective bargaining agreement in that case required just cause for discharge and provided that "[v]iolation of any Company rule shall be considered as just cause." Like the Third Circuit, the Seventh Circuit upheld the arbitrator's conclusion that the contract did not mean that every "dischargeable offense" necessarily provides just cause for discharge. The Seventh Circuit stressed the primacy of labor arbitrators in interpreting labor agreements and the limited scope of judicial review of arbitral awards, adding:

> Neither the correctness of the arbitrator's conclusion nor the propriety of his reasoning is relevant to a

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[7] *See also Super Tire Engineering Co. v. Teamsters Local Union No. 676*, 721 F.2d 121 (3rd Cir. 1983); *Teamsters Local 863 v. Egg Producers*, 773 F.2d 530 (3rd Cir. 1985).

> reviewing court, so long as his award complies with the aforementioned standards to be applied by the reviewing court in exercising its limited function. [629 F.2d at 1215.]

See also the Fifth Circuit's decision in *Waverly Mineral Products Co. v. Steelworkers*, 633 F.2d 682 (5th Cir. 1980) and the Eighth Circuit's decision in *Kewance Machinery v. Teamsters Local 21*, 593 F.2d 314 (8th Cir. 1979).

In reaching its decision below, the First Circuit expressly followed the decisions of the Sixth and Tenth Circuits in *Nestle* and *Mistletoe Express Service*, while implicitly rejecting the contrary approach taken by the Third, Fifth, Seventh and Eighth Circuits. Had this case arisen in the latter circuits, the award clearly would have been enforced as the courts in those circuits would have viewed it as within the arbitrator's province to harmonize the "proper cause" provision of the contract here with the Mill Rule defining "dischargeable offenses," and thus would not have interfered with the arbitrator's resolution of that issue.

C. The conflict among the circuits just noted reflects a fundamental disagreement among the courts of appeals concerning the respective roles of arbitrators and courts in interpreting collective bargaining agreements. That conflict threatens the arbitral system as a whole.

At bottom, the decision below in the instant case, and the decisions of the Sixth and Tenth Circuits on which the court below relied, rest on two propositions: first, that if the language of a contract is "plain," the contract must be read literally without regard to bargaining history, past practice, industry custom or the like; and second, and more importantly, that the question of whether contract language has a plain meaning is a *question of law* which the courts are to resolve *de novo*. That this is the theory of the latter two courts is clear from the opinions in *Nestle* and *Mistletoe Express* which we pre-

viously quoted. And the opinion below is, if anything, even more explicit in this regard: after stating (in words borrowed from the Sixth Circuit) that the arbitrator " 'may construe ambiguous contract language' " but may not " 'disregard or modify plain and unambiguous provisions,' " the First Circuit framed the inquiry before it as follows: "we must examine the award and the judgment below in the light of the contract to see if the contract was unambiguous." Pet. App. 11a. And completely ignoring the Company's own handbook and its past practice on which the Arbitrator had relied, *see* pp. 5-6 *supra*, the court of appeals overturned the award because "[w]e disagree that Mill Rule 7(a) was so ambiguous that it took away from the employer the exclusive right to determine the punishment to be imposed . . . ." *Id.* at 5a.[8]

Perhaps the clearest demonstration of how far the courts with which the First Circuit has aligned itself are prepared to go in overturning arbitral awards is the recent decision by the Sixth Circuit, whose earlier decisions paved the way for the decision below in the instant case, in *Dobbs Inc. v. Local 614, International Brotherhood of Teamsters*, 813 F.2d 85 (6th Cir. 1987). In *Dobbs*, the Sixth Circuit made explicit the implications of the earlier rulings by holding that an arbitration award *fails* to draw its essence from the contract whenever:

> (1) an award conflicts with express terms of the collective bargaining agreement, (2) an award imposes additional requirements that are not expressly provided in the agreement, (3) an award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) an award is

[8] To be sure, the decision below, and the decisions on which the court below relied, contains an obligatory sentence paying lip-service to the principle of limited judicial review. Nonetheless, as shown in text, the reasoning of those courts, and their actual holdings, rest on the activist premises stated in text.

> based on general considerations of fairness and equity instead of the precise terms of the agreement . . . *Id.* at 86 (citation omitted).

Under this approach, past practice, bargaining history, and all other indicia of the intent of the contracting parties become irrelevant, so long as the *court* determines that the arbitrator's award is at odds with the "precise terms" of the agreement, or concludes that the arbitrator has found an implied agreement not "expressly provided" in the contract's written language.

In contrast, the courts of appeals on the opposite side of the question presented here have enforced arbitral awards indistinguishable from the instant award because those courts have a very different understanding of the judicial role in reviewing decisions of arbitrators: *viz.*, that arbitrators are entitled to rely on "context and any other indicia of the parties' intention," p. 14 *supra*, and are *not* duty bound to give a dryly literal reading to the contract's words unilluminated by the other factors that normally go into ascertaining the intent behind those words. *A fortiori*, those courts have not arrogated to themselves the power to determine whether the language of a contract is "plain," or to impose the court's understanding of the contract language on the parties. To the contrary, those courts understand that, as the arbitrator "was engaged in construction and interpretation of the collective bargaining agreement," the judicial role is at an end and the arbitral award is entitled to enforcement. *Kewanee Machinery*, *supra*, 593 F.2d at 318.

D. In our view, it is only these latter decisions—and not decisions such as the one below—which are faithful to the lessons of the *Steelworkers Trilogy*. The *Trilogy* teaches that "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining

agreement although not expressed in it." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 581-82 (1960).[9] More fundamentally, the *Trilogy* recognizes that when the parties provide for arbitration in a collective bargaining agreement, "[i]t is the arbitrator's construction which was bargained for" and hence "the question of interpretation . . . is a question for the arbitrator." *Enterprise Corp.*, 363 U.S. at 599. And most important of all, the *Trilogy* holds that the arbitral system must not be disturbed by "excessive judicial interference," *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 n.6 (1960), and thus that an arbitral award may not be overturned merely because the court's "interpretation of the contract is different from [the arbitrator's]," *Enterprise Corp.*, 363 U.S. at 599.

E. If all that were involved here were "merely" a 4 circuit to 3 circuit conflict as to the meaning of collective bargaining agreement provisions defining "dischargeable offenses," and the role of the courts in this category of disputes, there would be ample reason for the Court to issue a writ of *certiorari* in this case. Given the prevalance of contract provisions of this type, the conflict among the courts of appeals with respect to these provisions in and of itself warrants resolution by this Court. Absent such review, unions and employers cannot know with any certainty what significance will be given to the inclusion of such a provision in a collective bargaining agreement, and agreements which are national in scope and intended to be uniform in their application will have different meanings in different jurisdictions.

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[9] *See also* Justice Brennan's concurring opinion in the *Trilogy*, 363 U.S. at 570: the meaning of the labor agreement "is not to be found simply by reference to the dictionary definitions of the words the parties use. . . . Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial self-government . . . are to be understood only by reference to the background which gave rise to their inclusion".

As we have seen, however, far more is at stake here than a conflict over the approach to a particular contract clause category; the decision below is the result of a deeper conflict regarding the proper scope of judicial review of labor arbitration awards. That conflict makes it imperative for this Court to resolve the dispute in the lower courts.

As this Court has stated "the basic policy of national labor legislation [is] to promote the arbitral process as a substitute for economic warfare." *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 105 (1961). The *Steelworkers Trilogy's* holding that the merits of labor arbitration awards may not be reviewed by the courts is an essential element of this policy. As the Court recognized there, if the merits of awards were routinely subject to wide-ranging judicial review, the finality which the parties seek in arbitration would be lost, as would the primary attraction of arbitration as a substitute for economic warfare. Yet the decision below (and the like decisions of the Sixth and Tenth Circuits) strips all arbitral awards of any claim to finality, and opens the courthouse doors wide to attacks on decisions of arbitrators by holding out the prospects of a judicial invalidation of an arbitral award whenever a court can be persuaded that the award is inconsistent with the bare words of the contract read in a literalistic fashion.[10]

---

[10] There has been a significant increase in the number of appellate court cases attacking decisions of arbitrators. In the five-year period between 1971-75, there were fewer than 15 of such reported cases. *See* 2 Bureau of National Affairs, *Labor Relations Cumulative Digest and Index, 1971-75*, pp. 1659-67 (1976). In the five-year period between 1981-85, the number of such cases more than tripled, to over 50. *See* 2 Bureau of National Affairs, *Labor Relations Cumulative Digest and Index, 1981-85*, pp. 2549-71 (1986).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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87-589

Supreme Court, U.S.
FILED
OCT 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO, LOCAL NO. 1069,
Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF
SCOTT PAPER COMPANY,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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60

TABLE OF CONTENTS

		Page
A.	Opinion of the United States Court of Appeals for the First Circuit	1a
B.	Order of the United States Court of Appeals for the First Circuit denying rehearing en banc	20a
C.	Opinion of the United States District Court for the District of Maine	22a
D.	Opinion and Award of the Arbitrator	39a
E.	Order extending time to file petition for writ of certiorari	98a
F.	Order extending time to file petition for writ of certiorari	99a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 86-1405

S.D. WARREN COMPANY,
A DIVISION OF SCOTT PAPER COMPANY,
Petitioner, Appellant,

v.

UNITED PAPERWORKERS' INTERNATIONAL UNION,
AFL-CIO, LOCAL 1069,
Respondent, Appellee.

Appeal from the United States District Court
for the District of Maine

[Hon. Gene Carter, a *U.S. District Judge*]

Before

Campbell, *Chief Judge*,
Torruella, *Circuit Judge*,
and Pieras,* *District Judge.*

S. Mason Pratt, Jr. with whom *Elizabeth S. Pearce* and *Pierce, Atwood, Scribner, Allen, Smith & Lancaster* were on brief for appellant.

Stephen P. Sunenblick with whom *Charles W. March* and *Sunenblick & Reben* were on brief for appellee.

March 31, 1987

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* Of the District of Puerto Rico, sitting by designation.

PIERAS, *District Judge.* This appeal is from a judgment of the United States District Court for the District of Maine, enforcing an arbitration award under the jurisdiction provided by section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. section 185 (1982). The district court upheld the arbitrator's decision that the collective bargaining agreement was ambiguous as to the kind of right given the employer to discharge employees involved with drugs, that the contract allowed the arbitrator to review the degree of punishment to be given the employee, and that the arbitrator's award did not violate public policy. *S.D. Warren Co. v. United Paperworkers International*, 632 F. Supp. 463 (D. Me. 1986).

These erroneous conclusions, which are the basis of both the arbitrator's award and the judgment below, require that the judgment be reversed and the award vacated.

I.

The United Paperworkers' International Union, AFL-CIO, Local 1069, in representation of employees of S. D. Warren Company, entered into a collective bargaining agreement with S. D. Warren. The pertinent portions of the collective bargaining agreement for the purposes of our review follow. The Management Rights Clause affirmed that

> [t]he Company reserves the sole right to manage the business of the Company . . . and to direct the working force. This right includes but is not limited to . . . the right to . . . demote, transfer, discipline, suspend or discharge employees for proper cause or to relieve them from duties because of lack of work or for other legitimate reasons.

The contract provided for levels of conciliation proceedings culminating in arbitration. The scope of the arbitrator's authority was circumscribed as follows:

> the matter may be referred to by either party to an arbitrator for decision, but it is agreed that the matter thus referred shall be concerned solely with the interpretation on and/or application of the collective bargaining agreement. . . . The decision of the arbitrator shall be final and binding on the parties.

The parties to the contract further defined the role of the arbitrator by agreeing that "the arbitrator shall have no power to render a decision which in any way adds to, subtracts from, or modifies any provision of the agreement."

As an appendix, the contract also contained Mill Rules. Rule 7 read as follows:

> 7. Causes for Discharge. In any organization, certain rules of conduct must be observed by the members for the good of all. Violation of prescribed rules are cause for disciplinary action of varying degrees of severity. Violations of the following rules are considered causes for discharge: (a) Possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs. The possession or use of a specific narcotic or drug properly prescribed by a licensed physician is the only exception to this rule.

The seriousness of the drug offenses proscribed in the contract was brought to the attention of the employees many times, including a union newsletter: "Once again it is necessary to remind everyone that the use of illegal drugs and/or alcohol is, a very serious offense. The company has notified the Union that anyone caught possessing and/or using drugs or alcohol on company property will be immediately terminated."

The Maine State Police Drug Unit investigated the drug problem at employer's plant. An undercover narcotics agent was employed at the mill. As a result of the investigation, twelve employees, including the grievants,

were shown to have violated Mill Rule 7(a) and consequently were discharged by the employer.

The Union took the grievance to arbitration. Arbitrator Suzanne Gwiazda found that the grievants had violated Mill Rule 7(a). The arbitrator found extenuating circumstances in each case and decided that suspension, not discharge, was the appropriate sanction. Although we believe that the nature of extenuating circumstances are immaterial for the purpose of deciding this case, we will nevertheless refer to them to demonstrate that such personal concern by the arbitrator violated the clear language of the Management Rights Clause. The arbitrator took into consideration that grievant Linda Willoughby was the only female in her department and under pressure to do her work faster, was advised by employer's physician to take an extended leave, and was diagnosed as suffering from anorexia nervosa. Willoughby gave the investigator only a small amount of marijuana. Kimberly Denis was also the only woman in her area and dependent on the investigator for a time. She sold the agent twenty dollars worth of marijuana. Grievant Debra Graham was approached by the agent six or seven times about drugs and eventually sold him four grams of marijuana for thirty dollars.

The arbitrator's award was based on the undisputed facts recounted here. The arbitrator's pivotal conclusion, however, was that Mill Rule 7(a) is ambiguous in that it does not use the obligatory "must" when delineating the employer's right to terminate for violation of the rule. Although the permissive "may" does not appear in the contract, the word did appear in this context in the company's safety policy handbook. The arbitrator found this noteworthy and concluded that she could assess the kind of infringement of the rule and provide a punishment less than the sole punishment allowed by the collective bargaining agreement. The arbitrator also relied on the Management Rights Clause's identification of

"proper cause" required for discharge while the heading of Rule 7 was simply "Causes for Discharge." This discrepancy, in the arbitrator's eyes, was sufficient to place the entire matter of discipline within her interpretative domain.

The district court affirmed the award, stating that it would not construe "cause" as equivalent to "proper cause" and declined to disturb the arbitrator's decision. *S.D. Warren*, 632 F. Supp. at 468. Further, the court stated that it could not be said that the arbitrator's reasoning was "so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *Bettencourt v. Boston Edison Company*, 560 F.2d 1045, 1050 (1st Cir. 1977). Consequently, it dismissed the employer's complaint. The court also found that the award did not violate public policy. *S.D. Warren*, 632 F. Supp. at 468.

We disagree that Mill Rule 7(a) was so ambiguous that it took away from the employer the exclusive right to determine the punishment to be imposed for violation of that clause, and that the scope of the arbitration clause invested the arbitrator with the ultimate decision pertaining to punishment. We also disagree with the arbitrator and court below that the award does not violate public policy. Accordingly, we reverse the district court's judgment and vacate the arbitration award.

II. THE ARBITRATOR'S AUTHORITY TO INTERPRET THE CONTRACT

The fact that cases, for quite practical reasons, have allowed arbitrators great latitude in interpreting collective bargaining agreements does not detract from the fact that all arbitration awards must draw their essence from the collective bargaining agreement. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The purpose of the bargaining is to reach an agreement where competing yet legitimate interests are

defined and accommodated. The definition of such interests is important because ambiguity may cost the parties great loss and irreparable damage through strikes, work slow-downs, and lawsuits that affect the stability of the employer and its employees. Labor negotiations are an intense enterprise that, besides taking precious time and money, settle general business planning. Dealing with the economic survival of all concerned, they are often emotionally charged. During the course of negotiations, parties give in to each other's wishes in exchange for some advantage gained. Thus, the wills of the parties are tempered and accommodated to the point where the meeting of the minds is forged into a social contract, the collective will of all. This dear time invested in negotiations creates a balance of rights and obligations—rarely equaled by the best prestidigitator in his prime—which is essential to the administration of the enterprise and serves as the legal train that carries the relations between the employer and its unionized employees. This balance of equities cannot be disturbed by glossing onto the contract the social philosophy of an arbitrator. The contract itself, not the arbitrator, is the social instrument containing the collective reason of the parties to it.

In order to promote arbitration and avoid delays in decision that industries can ill afford, Congress enshrined arbitration as the preferred means of resolving industrial disputes. Labor-Management Relations Act of 1947 § 203(d), 29 U.S.C. § 173(d) (1982). It is salutory to protect the conciliation and arbitration procedure of the collective bargaining contract. In most cases, disputes are resolved at the initial level of the meeting between the foreman and the shop steward or between the personnel manager and the union representative that takes place on the premises immediately following the grievance. If the grievance proceeds to arbitration, the dispute is reviewed by persons usually conversant with the industry and its problems and sitting in the same community as the parties. Such a procedure keeps the wheels

of production and progress turning without interruption. Therefore, the courts have devised a series of rules to smooth the arbitration procedure and effectively endowed the arbitrator with extraordinary authority, even more authority than a court of first instance. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960) (arbitration clause will preempt court jurisdiction over labor dispute); *United Steelworkers v. Gulf & Western Co.*, 363 U.S. 574 (1960) (disputes between employer and union presumptively arbitrable); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (arbitration awards shall be enforced unless they do not draw their essence from the collective bargaining agreement).

Most reasons advanced for the special treatment of the conciliation and arbitration procedure have been of a practical nature. Compared with litigation, arbitration is more expedient and less expensive. The agreement that the arbitrator's award be final and binding cuts off further uncertainty as to the rule of the shop, and allows greater efficiency and better planning through a peaceful resolution of labor disputes. R. I. Abrams, "The Integrity of the Arbital Award", 76 Mich. L. Rev. 231 (1977). Deeming it necessary to protect this working procedure in the labor relations field, the courts have adhered to the rule that an arbitrator's interpretation of the collective bargaining agreement is final and binding on the parties because it is the interpretation that is bargained for by the parties. *Enterprise Wheel & Car*, 363 U.S. at 597; *In re Hotel Da Vinci, Inc.*, 797 F.2d 33, 34-35 (1st Cir. 1986); *Hoteles Condado Beach v. Union*, 763 F.2d 34, 41 (1st Cir. 1985).

Nevertheless, the courts have not been willing to sacrifice logic, reason, and sound principles of contract law on the altar of the practicality of giving unlimited power to arbitrators and absolute deference to their interpretations of collective bargaining agreements.

> An arbitrator is confined to the interpretation or application of the collective bargaining agreement; he does not sit to dispose his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Enterprise Wheel & Car, 363 U.S. at 597.

This Circuit has followed this directive allowing an arbitration award to be vacated when the award is " 'unfounded in reason and fact' . . . or is based in reasoning 'so palpably faulty that no judge or group of judges could ever conceivably have made such a ruling,' or is mistakenly based on a crucial assumption which is 'concededly a non-fact.' " *Bettencourt*, 560 F.2d at 1050 (citations omitted). Other circuits have dealt with the limitation of the power of an arbitrator and have found that he is "confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions." *Detroit Coil v. International Association of Machinists*, 594 F.2d 575, 579 (6th Cir.) *cert. denied*, 444 U.S. 840 (1979).

The Federal Arbitration Act, 9 U.S.C. § 10 (1982) is applicable to labor cases of this nature. *Electronics Corporation of America v. International Union of Electrical, Radio and Machine Workers, Local 272*, 492 F.2d 1255, 1258 (1st Cir. 1984); *see also Hoteles Condado Beach*, 763 F.2d at 42. The act provides that a district court may issue an order vacating an award

> (d) [w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and indefinite award upon the subject matter submitted was not made.

When the arbitrator exceeds her power or imperfectly executes it to the extent outlined in the Federal Arbitration Act, the arbitration award cannot draw its essence from the collective bargaining contract and such construction is not the one the parties bargained for.

The usual case is where the management prerogative to discipline is not coupled with a specific punishment for the violation. Then, the punishment imposed by management together with the factual basis for the punishment is subject to review by the arbitrator. This is not the case before us. Here, not only did the collective bargaining agreement specifically delineate the precise punishment for violation of Mill Rule 7(a) ("violations of the following rules are considered causes for discharge . . ."), the agreement also contained a Management Rights Clause reserving to the company "the right to . . . discharge employees for proper cause." The agreement further specified that "the arbitrator shall have no power to render a decision which in any way adds to, subtracts from or modifies any provision of the agreement." Collective Bargaining Agreement, Art. XII, section 6.

The case of *Local 217, International Union of Electric Radio and Machine Workers v. Holtzer-Cabot Corporation*, 277 F. Supp. 704 (D. Mass. 1967), dealt with a contract where the offense and the penalty for that offense were specified.

> 31. *Personal Conduct*
>
> The extent of any disciplinary action will depend upon the seriousness of the offense in the judgment of the Factory Management, with due regard for previous records of factory rules observance.
>
> As a guide for personal conduct, there are listed below certain acts of misconduct that should be avoided for the good of all. These actions or rule violations are classified into three categories: the least serious rule violations are listed under Group

I, the more serious under Group II, and the most serious under Group III.

Group II.

c. The making of false, vicious, or malicious statements concerning another employee. . . .

f. The use of abusive, obscene, profane, or threatening language to fellow employees.

PENALTIES FOR FAILURE TO OBSERVE COMPANY RULES

Group II

First Violation of any Group II rule: One week's suspension without pay.

Second Violation of same rule or two first violations of different Group II Rules: Dismissal.

Local 217, 277 F. Supp. at 707.

The arbitrator found a violation of the above-cited rule. The court decided that the penalty for violation of the rule in question was a matter left to the discretion of management and that the arbitrator could not modify the penalty "simply because he thought mitigating circumstances rendered [suspension] too severe." 277 F. Supp. at 708. The court further stated that the arbitrator, having found that the employee violated the rule, lacked authority under the contract to alter the penalty.

In *International Brotherhood of Firemen and Oilers v. The Nestle Company*, 630 F.2d 474 (6th Cir. 1980), the court reversed the judgment of the district court enforcing an arbitration award. The collective bargaining agreement contained a standard management rights clause. It described particular violations as follows: "Art. XII(a) Intoxication, dishonesty, incompetency, insubordination or failure to perform satisfactorily the

usual, customary duties of the employee, shall constitute cause for the dismissal of an employee from the service of the company." 630 F.2d at 475. The arbitrator found that the offense had been committed but reduced the penalty determined by management. The Sixth Circuit, in vacating the award and characterizing the arbitrator's reasoning as "incredible," stated:

> In our case, the collective bargaining agreement expressly provided that insubordination shall be grounds for discharge. It is clear and unambiguous. It needs no interpretation and we find no provision in it giving the arbitrator power to prescribe the penalty for violation of the collective bargaining agreement or to control the exercise of it by the employer. This power was vested solely in the employer.

630 F.2d at 477.

All these decisions are grounded on the principal that in management resides the inherent right to manage and that the right to manage includes the prerogative to discharge for cause. If the parties to a collective bargaining agreement have the intention to reverse this traditional understanding, they must do so by express and clear language divesting the employer of this right. The language in the contract before us specifies the penalty for violation of Mill Rule 7(a). Instead of withdrawing the rights of management, the parties ratified them.

Now we must examine the award and the judgment below in the light of the contract to see if the contract was ambiguous. The bare argument of ambiguity is based on the fact that Mill Rule 7(a) does not state in so many words that the employer must terminate an employee for a violation. Appellee argues that this makes the rule ambiguous and that therefore the arbitrator could determine the punishment. It is further argued that the contract is also ambiguous because, in the General Management Clause, the employer may terminate

for "proper cause" and in Rule 7 providing the authority to terminate, the heading reads "Causes for Discharge.

We disagree. The phrases "proper cause" and just plain "cause" in the labor relations parlance are interchangeable and have the same meaning. The common, everyday meaning is identical; all connote the conclusion that there is a cause that justifies the action. *Cf.* 2 Collective Bargaining: Negotiations and Contracts (BNA) § 40:1 (1983) (grouping "for cause" and "for just cause" dismissal standards for statistical purposes). If possession of marijuana is cause for discharge, as Mill Rule 7(a) flatly says, we are at a loss to see how it would not also be "proper cause" for discharge. The agreement does grant the employer the right to apply disciplinary action varying in degree of severity in accordance with the rule violated: "Violation of prescribed rules are cause for disciplinary action of varying degrees of severity." This clause applies to certain violations. But as to violations of Rule 7(a), the right of the employer is to discharge. Therefore, we conclude that the parties at the bargaining table had a meeting of the minds, that in cases of possession, use, or sale of marijuana on company property, the employer had a right to discharge.

In the case of *Litvak Packing Co. v. Amalgamated Butcher Workmen Local No. 641*, 455 F. Supp. 1180 (D. Colo. 1978), the contract provided: "No employee covered by this agreement shall be suspended, demoted or dismissed without just and sufficient cause. Sufficient cause for discharge shall include, among other reasons . . . insubordination." *Id.* at 1180. The employer discharged the employee for insubordination. However, the arbitrator found extenuating circumstances and concluded that "[o]n balance, [the] indiscretion [does] not warrant the penalty of discharge" and ordered his reinstatement with back pay accruing after a two-month sus-

pension. *Id.* at 1181. The district court vacated the award. The union in *Litvak* argued in the same manner as appellee here, that because just cause was not defined, it was within the arbitrator's authority to find that, even though sufficient cause for discharge existed, the dismissal of the employee was not "just" under the circumstances of the case. The court rejected this argument.

> To interpret the agreement as suggested by the defendants, however, would render meaningless the lengthy and specific elaboration of "sufficient" cause for discharge contained in article 6 of the agreement. The only rational purpose of the provision is to grant the employer an absolute right to terminate an employee for serious misbehavior, including . . . insubordination. . . .

Id. at 1182; *see also Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692, 694 (10th Cir. 1977).

The rationale as to why, when the employer has gained at the bargaining table the right to impose certain disciplinary action, the arbitrator has no right to determine the kind of disciplinary action has been expressed by the Fourth Circuit as well.

> The reservation of a right to either discipline or discharge for cause could be wholly ineffective and meaningless if the employer's action, pursuant to such right, is subject to review by an arbitrator on the basis of appropriateness. If the reserved right is construed to mean that the employer can take no disciplinary action in excess of a reprimand, except at its own risk and subject to severe penalties in case an arbitrator should later be of the opinion that some milder action is appropriate, the effect would be that employer's inherent right which has not been expressly relinquished by contract is no right at all.

Textile Workers Union v. American Thread Co., 291 F.2d 894, 899 (4th Cir. 1961). When the general just

cause provision for discharge is coupled with a specific penalty provision, the appropriateness of the penalty is removed from consideration and is without the scope of review of the arbitrator. *See Morgan Services, Inc. v. Local 323, Chicago and Central States Joint Board*, 724 F.2d 1217, 1221-22 (6th Cir. 1984) (gathering cases).

If this arbitration award is to stand, the employer will lose in the arbitration process what it earned the hard way at the bargaining table. In the absence of Mill Rule 7(a), the employer's determination to impose the penalty of discharge would be subject to be reviewed by an arbitrator. By incorporating Mill Rule 7(a), however, the parties had the intention of allowing one of them, the employer in this case, to determine the nature of the punishment: the maximum of discharge on the first offense or no penalty. Otherwise, the parties would have remained mute and the pretention of this arbitrator as to interpretation of this clause would be valid. In the absence of this language, the employer could have discharged the employee and such action would had been subject to arbitral review. Then why incorporate Mill Rule 7(a)? We cannot accept that the parties did something with no meaning. Labor negotiators must also be given great respect because they are the real parties in interest and the ones that in the long run will suffer or benefit from their acts at the negotiating table. We should not be inclined to conclude that what they agreed upon is ambiguous, for that would be splitting hairs to find a way to thwart the contractual will. On the contrary, we should find that the contract has a regular, logical meaning.

In this case, the parties have cooperated in the forging of their collective bargaining agreement and confirmed the right of manager to manage and to exercise discretion by discharging employees involved in drugs, believing that drugs in the workplace is affecting production, efficiency, quality, and plant safety. Management, with the

negotiated concurrence of the union, determined that the drug scene creates a hostile and undesirable work environment that could not be tolerated. Discharge was stiplated, therefore as a penalty to be meted out by management. Under these circumstances, the imposition by the arbitrator of a punishment the parties did not bargain for does not draw its essence from the collective bargaining agreement and such a construction is not the one the parties bargained for.

III. PUBLIC POLICY

To examine the issue of public policy raised by the employer in perspective, we must consider the effect of the use of drugs in the shop and its effect on the safety of all employees.

A) *The relation of use of drugs to safety*

This is a paper mill where the employees, among other things, handle large, bulky materials and drive heavy machinery and trucks. The arbitrator concluded that "drug-dealing constitute[s] a danger to all employees' safety." One of the grievants, Kimberly Denis, admitted that smoking marijuana while working was dangerous. "I never smoked in the mill; it's a good way to lose your fingers." The arbitrator concluded that possessing or selling marijuana at work jeopardizes the safety of all workers. The employer and union, in their notices to employees, stated that the use of drugs in the shop creates dangers and is unsafe. The union summarized the effect of the use of drugs in the shop in a newsletter: "The union can only hope that everyone will follow these rules and not jeopardize their job, their families, or the safety of their fellow workers." In connection with this statement, we are at a loss to see how the union insists on permitting employees known to be drug user and sellers to continue employment to the detriment of employees who do not use drugs. The union represents all employ-

ees, and the welfare of all employees should be paramount.

In view of the evidence and the conclusion of the arbitrator, we conclude that the use and sale of drugs in this shop is dangerous and constitutes a threat to the safety of all the employees. It also constitutes a violation of the state and federal law.

B) *Whether there is a well-defined public policy against the use of drugs in the workplace*

We must examine the facts in this context by examining the laws and legal precedent pertaining to illegal drug sale and use. We do so, mindful that particularly in the labor field, the Supreme Court has unequivocably stated that "the question of public policy is ultimately one for resolution by the courts." *W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766 (1983).

There are laws against the sale and use of drugs enacted by all states, including the State of Maine, and the sale and use of drugs is a serious offense under federal laws. *E.g.*, 21 U.S.C. § 841 (Supp. III 1985). Furthermore, the nation has focused on the corrosive consequences of drug sale and use and has devoted itself to their eradication. In particular, the work shop is a place where such usage is abominable not only because of the health hazard it creates, but also because it creates an unsafe atmosphere and is deteriorative of production, the quality of the products, and competition.

We conclude that there is a well-defined public policy against the use of drugs in the workplace.

C) *The arbitration award and public policy*

The court cannot enforce arbitration awards that do not draw their essence from the collective bargaining agreement. *Enterprise Wheel & Car*, 363 U.S. at 597. The Courts vacate such awards as outside of the power

of the arbitrator. Likewise, when the arbitrator's exercise of power, either inside or outside the scope of the collective bargaining agreement, contravenes explicit public policy, the court cannot stand idly by.

The Supreme Court had noted in a number of areas that an arbitration award should be vacated if the award is in "manifest disregard" of the law. *E.g., Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (securities arbitration). Lower courts have vacated labor arbitration awards entered against public policy. *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984) (reinstatement of postal worker convicted of embezzlement vacated even though award did not violate a particular statute); *American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280 (9th Cir. 1982) (reinstatement of postal strikers who violated 5 U.S.C. § 7311 vacated), *cert. denied*, 459 U.S. 1200 (1983); *Teamsters Local Union 249 v. Consolidated Freightway*, 464 F. Supp. 346 (W.D. Pa. 1979) (award vacated when practical effect was to require truck drivers to violate state highway safety laws). *See generally*, Comment, *Employment at Will in the Unionized Setting*, 34 Cath. U.L. Rev. 979, 1004 (1985) (authored by David L. Durkin).

The appellee union insinuates that in order to apply public policy, we must find a statute providing that possession and distribution of marijuana in the workshop of a paper mill is a crime punishable by a jail sentence. We do not believe the statute in question in any particular case must be so definite as applicable to any particular industry. This Circuit held that, although there was no specific statute to the effect that a postal employee could not steal postal money orders, to uphold the award would clearly contravene the general statute outlawing embezzlement. *Postal Workers*, 736 F.2d at 825. The penal statutes in the instant case treat all persons the same: no distinction is made for persons whose ac-

tivities may endanger lives and property by their drug use. But, in both cases, when viewed in relation to the industry, these statutes acquired special import. The use of drugs in the case before the court created a dangerous situation that imperiled the safety of fellow employees. A hostile atmosphere developed where innocent workers were grouped together with "junkies." In *Postal Workers*, the violation of the law became an issue of public policy under less detrimental circumstances. In this more life threatening case, this court can do no less. This arbitration award cannot be enforced as a matter of public policy. *Cf. Misco, Inc. v. United Paperworkers International*, 768 F.2d 739 (5th Cir. 1985) (enforcement denied to award reinstating paper mill employee who violated company rule against possession of marijuana on mill premises because award violated public policy), *cert. granted*, 107 S. Ct. 871 (1987) (No. 86-651).

The arbitrator refused to consider the plain meaning of the words that the parties agreed upon. Under these circumstances, the imposition by the arbitrator of a punishment the parties did not bargain for does not draw its essence from the collective bargaining agreement and such a construction is not the one the parties bargained for. The linguistic legerdemain that this arbitrator performed was an attempt to garner more authority to herself than the parties agreed to give her. As such, she exceeded her authority. When the parties enshrined in the contract their intention that "violations of the following rules are considered causes for discharges: (a) possession, use or sale on mill property of intoxicants, marijuana, narcotics or other drugs," they meant just that, and the employer had the unhampered right to discharge.

In a separate appeal, consolidated with this case, the company has objected to the district court's denial of its motion under Fed. R. Civ. P. Rule 60, for relief from judgment. Given our resolution of the company's appeal

from the district court's denial of the petition to vacate the arbitration award, the Rule 60 appeal is moot.

IV. CONCLUSION

For the above reasons, we reverse the judgment of the district court denying the company's motion to vacate the arbitration award and remand for further proceedings consistent with this opinion. The appeal from the denial of the Rule 60 motion is dismissed as moot.

Concurrence follows.

CAMPBELL, *Chief Judge* (concurring). Because the reasoning in Part II fully justifies the court's result, I see no occasion to reach the public policy argument set out in Part III. I therefore concur in the court's judgment and in the rest of its opinion, but I do not join in the public policy analysis found in Part III.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1405

S.D. WARREN COMPANY,
A DIVISION OF SCOTT PAPER COMPANY,
Petitioner, Appellant,

v.

UNITED PAPERWORKS INTERNATIONAL UNION,
AFL-CIO LOCAL 1069,
Respondent, Appellee.

Before

Campbell, *Chief Judge,*
Coffin, Bownes, Breyer, Torruella and Selya,
Circuit Judges,
and Pieras,* *District Judge.*

ORDER OF COURT

Entered: May 14, 1987

Upon consideration of respondent-appellee's "Petition for Rehearing and Suggestion of In Banc Consideration Upon Rehearing", which document was submitted to the members of the panel and to the judges of the Court who are in regular active service; and,

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* Of the District of Puerto Rico, sitting by designation.

The judges of the panel having voted to deny the petition for rehearing, and the judges of the Court who are in regular active service having voted against rehearing in banc,

It is ordered that the petition for rehearing and suggestion of in banc consideration be, and the same hereby is, denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

By: /s/ Richard W. Gordon
Chief Deputy Clerk

[cc: Messrs. Pratt and Sunenblick]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 85-0321-P

S.D. WARREN,

Petitioner,

v.

UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO LOCAL 1069

Respondent.

CARTER, District Judge

OPINION

INTRODUCTION

In this action, S.D. Warren Company seeks to overturn, and the United Paperworkers Union seeks to enforce, an Arbitrator's decision to reinstate three employees who were discharged by the Company. The employees, Kimberly Denis, Deborah Graham and Linda Willoughby, were discharged in connection with an undercover investigation conducted at the Company, for violation of a rule contained in the Collective Bargaining Agreement prohibiting the possession, use or sale of marijuana on mill property. The Arbitrator sustained the grievances of these employees and directed the Company to reinstate them with full back pay, seniority and benefits but imposed unpaid suspensions of seven months, nine months and four months, respectively.[1] After re-

[1] Marshall Buhelt, who was also a grievant in this proceeding, is now deceased. The Arbitrator denied his grievance and the Union did not seek to vacate the Arbitrator's decision.

viewing the submissions regarding the Company's Motion to Vacate the Award, the Magistrate issued a Recommended Decision finding that while enforcement of the Motion should be granted on the basis that the Arbitrator had exceeded her authority. Both parties filed objections to the Recommended Decision, the Union in regard to the Magistrate's determination that the Arbitrator had exceeded her authority, and the Company in regard to the Magistrate's finding that the award did not violate public policy. After reviewing the record, the Court has determined that it must enforce the Arbitrator's award.

STANDARD OF REVIEW

This matter is not a pretrial motion and it is dispositive of the parties' dispute. Therefore, in reviewing the Magistrate's Recommended Decision this Court must make a *de novo* determination upon the record under 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). *See, e.g., Aluminum Company of America v. United States Environmental Protection Agency*, 663 F.2d 499 (4th Cir. 1981).

The standard under which a United States District Court may review an arbitration award is extremely narrow. In accordance with established policy, "[w]here parties to a collective bargaining agreement have provided for arbitration as the final and binding method for settling grievances the arbitration award is normally non-reviewable by a court." *Bettencourt v. Boston Edison Company*, 560 F.2d 1045, 1048 (1st Cir. 1977), *citing United Steelworkers v. Enterprise Wheel and Car Corporation*, 363 U.S. 593, 599 (1960) (herein *Enterprise Wheel & Car*). *See also* 29 U.S.C. § 173(d); 9 U.S.C. § 10. Therefore, a Court is bound to enforce an arbitral award unless the decision does not "draw its essence from the collective bargaining agreement." *W.R. Grace & Company v. Local Union 759*, 461 U.S. 757, 764, *citing Enterprise Wheel & Car*, 363 U.S. at 597.

In order to overturn an arbitration award, this Court must find, at a minimum, that the decision is "unfounded in reason and fact," "based on reasoning 'so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling,' " or "mistakenly based on a crucial assumption which is 'concededly a nonfact.' " *Bettencourt*, 560 F.2d at 1050 (citations omitted). Apart from matters specifically excluded by the parties "all of the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions of the collective agreement." *United States v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 581 (1960) (herein *Warrior & Gulf*).

I. Did the Arbitrator Exceed Her Authority Under the Collective Bargaining Agreement?

The Collective Bargaining Agreement between the parties sets out a dispute resolution process at Article 12, Section 4. The disputes to be covered by this process are "differences . . . as to the meaning or application of the provisions of th[e] Agreement." The Agreement provides that, if such a dispute is not resolved by several levels of internal procedure,

> the matter may be referred by either party to an arbitrator for decision, but it is agreed that the matter thus referred shall be concerned solely with the interpretation on and/or application of th[e] collective bargaining Agreement . . . The decision of the arbitrator shall be final and binding on the parties.

The Agreement further states that "the arbitrator shall have no power to render a decision which in any way adds to, subtracts from, or modifies any provision of the Agreement."

The Agreement also includes a "Management Rights" clause which states:

> The Company reserves the sole right to manage the business of the Company and its Cumberland Mills operation and to direct the working force. This right includes but is not limited to . . . the right to select, hire, assign, promote, demote, transfer, discipline, suspend or discharge employees for proper cause or to relieve them from duties because of lack of work or for other legitimate reasons.

The Agreement includes an employees' seniority provision stating that mill seniority ends upon "discharge for proper cause." The final provision relevant to this case is Mill Rule 7(a), which is included in Appendix A of the Agreement. It states:

> 7. Causes for Discharge
>
> In any organization, certain rules of conduct must be observed by the members for the good of all.
>
> Violation of prescribed rules are cause for disciplinary action of varying degrees of severity.
>
> Violations of the following rules are considered causes for discharge.
>
> a) Possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs. The possession or use of a specific narcotic or drug properly prescribed by a licensed physician is the only exception to this rule.

The Arbitrator conducted a hearing in this case and found the following facts: In October 1983 Agent Timothy Berry was hired by the Company under name "Al" Berry as an entry-level employee at the mill. Agent Berry was, in fact, acting as an undercover agent for the State Police Drug Unit. That agency reached an arrangement with S.D. Warren, prior to Agent Berry's employment at the mill, that he would make himself

available to the Company for any administrative matter resulting from his work at the completion of the investigation. During this undercover operation, Agent Berry kept written reports which were eventually turned over to the Company and which formed the basis for the termination of twelve employees, including the grievants. The Reports disclosed, and the Arbitrator found to be proved beyond a reasonable doubt, that all three employees violated Mill Rule 7(a).

The Arbitrator found what might be termed "extenuating circumstances" in each of the three grievances she sustained. She found that Linda Willoughby was the first and only female employee out of fifty-two employees in the "winder room," and was under continual pressure from the men to do her work faster. The Award states that, after five years of working under these circumstances Ms. Willoughby was advised by the Company physician to take an extended leave. Upon return, she was diagnosed as suffering from anorexia nervosa and was enrolled in the Company's Employee Assistance Program, designed to assist employees with personal problems. The Arbitrator found that Ms. Willoughby was approached by Agent Berry eight to twelve times in the eight-to-twelve-week period she knew him, and approached an additional four times in her work area on January 30, 1984. Prior to the last approach on January 30th, she was reprimanded by her foreman in regard to Berry's repeated visits during a period of time when Ms. Willoughby was supposed to be working. On the last approach, the Arbitrator found, Willoughby took a bag from her pocket, gave Agent Berry a small amount of marijuana, about enough for one marijuana cigarette, refused payment, and told him to leave her alone. The Company terminated her employment for possession of marijuana. The Arbitrator found credible Ms. Willoughby's testimony that she never used marijuana at work, noting her service on the Safety Committee and that she had previously suffered a work injury.

The Arbitrator found that Kimberly Denis was the only female employee in her area and that, while any co-worker could make life difficult for her, she was especially dependent on her truck driver—for a period, Agent Berry—whose work could affect her bonus. The Arbitrator found that, after being approached three times, Ms. Denis agreed to try to get Agent Berry $20.00 worth of marijuana and to act as a "go-between," finding the marijuana for Berry from another employee at the plant. The Arbitrator stated, "Granted, Ms. Denis was in a vulnerable position. She was a woman half Berry's age working alone in an overwhelmingly male environment. She was in no position to risk alienating him, and she could not avoid him. But she had not exhausted her alternatives . . ." Arbitrator's Award (herein "Award") at 33.

The Arbitrator found that Agent Berry approached Deborah Graham six or seven times about drugs and that she was justified in concluding that reporting Berry would accomplish little other than making an enemy of someone she would continue to have to work with. The Arbitrator characterized her position as a "damned-if-you-do-damned-if-you-don't" situation. The Arbitrator found that Ms. Graham sold Agent Berry four grams of marijuana for $30.00.

The Arbitrator determined that, although the employees had violated Rule 7(a), the Company was not justified in terminating their employment. In her conclusion, Arbitrator explained that she was imposing heavy suspensions upon these three grievants in order to impress upon them the seriousness of their misconduct, but that in light of past disciplinary practice for similarly serious Mill Rule 7 violations, it was her determination that discharge was an excessively harsh punishment.

The Arbitrator rejected the Company's position that the plain meaning of the contract provides for immediate discharge in the instance of a violation of Mill Rule 7(a),

Award at 19, and found that the Company's decision to terminate these employees was subject to arbitral review. The Arbitrator found that the contract did not unequivocally state that the conduct listed in Mill Rule 7(a) was *proper* cause for discharge as required by the Management Rights and Seniority Provisions. She reasoned that, while Rule 7 is entitled "Causes for Discharge," it does not say whether such cause "*will* be" or "*may* be" grounds for termination. She found that the explanatory sentences following the Rule 7 heading heightened, rather than clarified, the ambiguity of the title (e.g., violation of prescribed rules are cause for disciplinary action of varying degrees of severity," etc.). She further found that the Company's position was not supported by a reading of Mill Rule 7 in conjunction with Mill Rule 8. Mill Rule 8 states that certain violations, other than those listed in Rule 7, are "Causes for Discharge after Appropriate Warning." The Arbitrator found that Rule 8 simply *guaranteed* a warning before an employee could be terminated for violating its provisions. It did not make clear that a warning would never be the appropriate discipline under the contract for a violation of Rule 7.

The Arbitrator also found that the Company's Safety Policy handbook, albeit a unilateral statement of the Company, did not remove the ambiguity of the Agreement. The handbook states:

> . . . violations of rules printed in red *may* mean immediate discharge. Violations of other rules may be cause for discharge after appropriate warning.

(Emphasis added.) Language tracking both Mill Rules 7(a) and 8(a), the latter of which, according to the Agreement, requires at least a warning prior to discharge, are printed in red.

Consequently, the Arbitrator concluded that Mill 7 was ambiguous as to whether employees *must* be terminated

and that it did not clearly state the agreement of the parties as to what constitutes proper cause for discharge. Since she found that the Rule was not an expression of the parties' agreement on what constituted proper cause, the Arbitrator determined that it was not an express exemption from the arbitral review process set out in the contract.[2]

The Magistrate found that the Arbitrator's conclusion ignored the plain meaning of the Agreement and therefore recommended that this Court vacate the award. *See Hoteles Condado Beach, L.A. Concha and Convention Center v. Union de Tronquistas Local 901*, 763 F.2d 34, 41 (1st Cir. 1985) *quoting Detroit Coil Company v. International Association of Machinists & Aerospace Workers, Lodge No. 82*, 594 F.2d 575, 579 (6th Cir. 1979) (an arbitrator is without authority to disregard or modify plain and unambiguous provisions). The Magistrate determined that through the Management Rights clause of the Agreement the Company reserved the sole right to discharge employees for proper cause, and that Rule 7 unequivocally makes clear that a violation of its provisions, including subsection (a), is adequate cause for discharge, despite the use of differing language. In recommending vacation of the Arbitrator's award, the Magistrate rejected the union's reliance on *Super Tire Engineering Company v. Teamsters Local Union No. 676*, 721 F.2d 121 (3d Cir. 1983), and *Kewanee Machinery Division v. Teamsters Local 21*, 593 F.2d 314 (8th Cir. 1979), which tended to support the Union's position that the Company's decision to terminate these grievants was subject to arbitration.

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[2] The Arbitrator further determined that past practice and bargaining history also did not support the Company's position that the meaning of the agreement plainly mandated discharge, and that the Company had not given sufficient notice of a change in policy.

After careful consideration the Court has determined that under the appropriate standard of review, as articulated by the United States Supreme Court, the First Circuit and other Circuit Courts of Appeals, this Court cannot accept the Magistrate's Recommended Decision to vacate the Arbitrator's award.

The issue here is whether, once the Arbitrator determined that the grievants had violated Mill Rule 7(a), she had authority under the contract to review the Company's chosen disciplinary action. It is the Court's task to determine whether the Arbitrator's construction of the contract provisions, and her resulting determination that the Company's penalty decisions are subject to arbitration, are contrary to the plain meaning of the contract.

The dispute resolution process in this Agreement covers "differences . . . as to the meaning or application of the provisions of this Agreement." Thus, the scope of the arbitration clause is broadly defined. In the context of ordering an employer to arbitrate a dispute, the United States Supreme Court has made clear that exclusions from the arbitration process must be specific and unambiguous.

> An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage . . . "[S]trictly a function of management" must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion.

Warrior & Gulf, 363 U.S. 582-83, 584.

The Company argues that the parties have agreed, as evidenced by Mill Rule 7, that the conduct of the grievants in this case constitutes proper cause for discharge.

The Union argues that the contract provides that such conduct *may* be proper cause. The Arbitrator resolved this conflict by concluding that Mill Rule 7 does not unambiguously require dismissal or reserve penalty decisions to the Company. *See supra* at 7-8. In her discussion of whether she had authority to reduce the Company's chosen penalty, the Arbitrator relied on her lengthy discussion of the ambiguity of the relevant contract provisions. She concluded that based on the ambiguity of Mill Rule 7, there was no express restriction in the Agreement limiting her authority under the arbitration clause. *Award* at 30.[3] Under these conditions, she stated "it is well established that . . . [an arbitrator] has the authority to fashion a lesser penalty[.]" *Id.* This Court cannot say her reasoning was "so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *Bettencourt*, 560 F.2d at 1050.

In fact, the Court of Appeals for the Eighth Circuit did reach similar results in *Kewanee* and *Super Tire*. Although the contract in *Super Tire* did not include the exact language of the "management rights" clause in this case, it did provide that the offense committed by the employee in that case would be "cause for dismissal." In *Kewanee*, in addition to construing a shop rule and a contract provision, the arbitrator in *Kewanee* construed "Management Rights" and "proper cause" provisions, both part of the contract, which were very similar to those presented in this case. The Eighth Circuit held that the arbitrator had authority to construe the Man-

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[3] This finding is predicated on a determination that Mill Rule 7 does not *require* the Company to discharge an employee who violates its provisions. The Arbitrator made such a finding based on her determination, *inter alia*, that the language of the Rule is ambiguous. *See supra* at 8. The same ambiguity which formed the basis for the Arbitrator's determination that the Rule does not require termination, provides the grounds for a finding that Rule 7 does not expressly remove a termination decision from arbitration.

agement Rights provision, reserving to the company the "sole right to . . . discharge employees" as subject to arbitral determination of proper cause. In contrast, in *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977), relied on by the Company, the contract specifically states that the parties had agreed, prior to the fact, on what conduct constituted "just cause" for termination, exactly the term employed in describing the Company's rights under the contract.[4]

In the instant case, the Court cannot vacate the Arbitrator's award because it would construe "cause" as equivalent to "proper cause," but must enforce the award if the Arbitrator's determination that the contract does not require dismissal or remove this issue from her jurisdiction is conceivably correct. In light of the conflicting authority on this issue, the Court must find that it is at least that.

II. *Does the Award Violate Public Policy*?

This Court accepts that portion of the Magistrate's recommendation (appended hereto as Exhibit "A") which concludes that the enforcement of this arbitration award does not violate public policy. In accepting the

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[4] The Court notes that in the context of determining the ambiguity *ve non* of the contract, the Arbitrator stated that the Company, by choosing to retain discretion over discipline, gave "a third party neutral the same discretion when reviewing the propriety of those decisions." *Award* at 20. This statement, taken alone, is not necessarily correct. An employer may specify in a collective bargaining agreement that it has discretion over the degree of punishment warranted by employee violations and that such decisions are not subject to arbitral review (unless arbitrary and capricious). *See, e.g., Mistletoe*, 566 F.2d 692. However, this sentence does not invalidate the rest of the Arbitrator's analysis regarding the ambiguity of the contract or her reasoning that if Mill Rule 7 does not expressly provide that possessing or selling marijuana on the job is proper cause for discharge, it is not an express exemption from arbitration of the Company's termination decision. *See Award* at 30.

Recommended Decision, the Court also notes *Premium Building Products Company v. United Steelworkers of America, AFL-CIO*, 616 F. Supp. 512, 516 (N.D. Ohio 1985) (court cannot establish an across-the-board ruling that public policy requires that anyone caught smoking marijuana at their workplace is subject to discharge in all cases), which was issued a few days prior to *Misco, Inc. v. United Paperworkers International Union*, 768 F.2d 739 (5th Cir. 1985). In addition, the Court notes the dissenting opinion in *Misco*, 768 F.2d at 743 (Tate, J.).

Accordingly, the Company's Motion to Vacate the Award of the Arbitrator is hereby *DENIED*.

So *ORDERED*.

/s/ Gene Carter
GENE CARTER
United States District Judge

Dated at Portland, Maine this 2nd day of April, 1986.

EXHIBIT "A"

PUBLIC POLICY

If the district judge rejects the recommendation of the previous section that the arbitrator's interpretation of the contract is within her auhtority, such a conclusion would ordinarily end the matter and the arbitration award would be enforced. In a narrow class of cases, however, the courts have declined to enforce an arbitrator's interpretation of a contract because the contract as interpreted would be contrary to public policy. The United States Supreme Court has identified the standards for application of this narrow exception:

> If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obligated to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general consideration of supposed public interests."

W. R. Grace & Co., 461 U.S. at 766 (citations omitted). The Fifth Circuit Court of Appeals has applied this principle to deny enforcement of contract interpreted by an arbitrator to require reinstatement of an over-the-road tractor-trailer driver who admitted drinking liquor on the job. *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983). Federal Motor Carrier Safety Regulations explicitly prohibited the driver's conduct and required the employer to prevent it. This court, affirmed by the First Circuit Court of Appeals, declined to enforce a contract interpreted by an arbitrator to require reinstatement of a postal employee who admitted embezzling over $4,000 worth of money orders. *U.S. Postal Service v. American Postal Workers*

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[8] If the recommendedd decision is accepted, the motion to strike affidavits is moot since they are not pertinent to the issue decided, but go to the Arbitrator's conduct of the hearing.

Union, 736 F.2d 822 (1st Cir. 1984). In that case, the First Circuit pointed to several federal statutes exemplifying a federal policy regulating the conduct of postal employees and protecting the public in its use of the postal service. In *Local 453 v. Otis Elevator Company*, 314 F.2d 25 (2d Cir. 1963), on the other hand, the court enforced a contract interpreted by an arbitrator to require reinstatement of a company employee who had violated a company rule against gambling on the premises and who was convicted of a misdemeanor. The court found that the public policy represented by the New York statutory prohibition was vindicated by the criminal conviction and further vindicated by a 7-month uncompensated layoff upheld by the arbitrator. The court found that no "greater vindication of the public ondemnation of gambling" was required. 314 F.2d at 29.

The issue in these cases is most specifically *not* whether the court approves the employee's conduct or the arbitrator's remedy ordering reinstatement, but whether enforcing a contract between the parties that requires such reinstatement (for the arbitrator's decision is the binding interpretation of what the contract requires) violates an "explicit," "well defined and dominant" public policy exemplified by "laws and legal precedents." *W. R. Grace & Co., supra.*[9]

In that connection, Maine State law provides that possession of a "usable" amount of marijuana is a civil violation, subject to a fine of up to $200. 22 M.R.S.A. § 2383. Trafficking and furnishing, which in this case would amount to selling or giving away the marijuana, are Class D crimes, 17-A M.R.S.A. §§ 1103(2)(C), 1106(2)(B), subject to imprisonment for less than one year

[9] The Union attempts to have the court consider the conduct of the police undercover operation in its analysis of public policy. That conduct, however, plainly has no bearing on whether enforcement of the collective bargaining agreement, as interpreted by the Arbitrator, is contrary to public policy.

and a fine of up to $1,000, 17-A M.R.S.A. § 1252(2)(D), 1301(B). Under federal law, possession is a misdemeanor with a penalty of imprisonment of not longer than one year, a fine of $5,000 or both, 21 U.S.C. § 844(a). Sales are felonies with penalties of up to five years imprisonment, up to $50,000 in fines, or both, 21 U.S.C. § 841(b)(1)(C), but a first offender possessing or distributing a small amount may avoid an adjudication of guilt and obtain probation for not longer than one year, 21 U.S.C. §§ 841(b)(4), 844(b)(1).

Thus, state and federal law provides only light penalties in connection with possession, furnishing, or distributing a small quantity of marijuana as is the case here. In Maine, possession is not even criminal, but a civil infraction. As a matter of federal law, if it is a first offense, an adjudication of guilt can be avoided. It is clear, moreover, that the policy of these statutes is directed to the public at large, not as in the *Amalgamated Meat Cutters* case to the specific category of over-the-road truckdrivers or as in the *U.S. Postal Service* case to the specific category of postal employees. Although the public policy of discouraging marijuana usage is clear, these statutes do not demonstrate a clear public policy preventing a company from agreeing with a union that it will discipline employees with lengthy periods of unpaid suspension but not outright dismissal if they violate a company rule on the subject.

I recognize that this conclusion is contrary to the decision reached recently by the Fifth Circuit Court of Appeals in *Misco, Inc. v. United Paperworkers International Union*, 768 F.2d 739 (5th Cir. 1985).[10] There, the court declined to enforce an arbitration award interpreting the collective bargaining agreement to require

[10] *Misco* failed even to cite the *W.R. Grace* decision and based its analysis solely upon that provision of *Amalgamated Meat Cutters* which dealt with the danger of the truckdriver's conduct rather than the specific laws which had been violated.

reinstatement of an employee found in possession of marijuana and in the atmosphere of marijuana smoke in another person's car on the company lot. The court found the award to be "against well defined public policy—the Louisiana law against possession of marijuana and the public policy, embodied in the employer's rule, against introduction of drugs into the workplace and consequent operation of dangerous machinery by persons under their influence." 758 F.2d at 741. With all due respect to the Fifth Circuit's conclusion, I believe it fails to follow the standards set forth in *W.R. Grace, supra.* As stated in *Muschany v. United States*, 324 U.S. 49, 66 (1945) (a case referred to in *W.R. Grace, supra*), "[a]s the term 'public policy' is vague, there must be found definite indications in the law of the sovereignty to justify, the invalidation of a contract as contrary to that policy." Thus, even though there may be a general state law against marijuana possession or usage, that does not demonstrate a well defined and dominant explicit public policy to prevent employers from agreeing that they will discipline their employees who violate that law in some way other than outright termination. *Misco*'s description of the risks to workplace safety when the dangerous machinery involved in that case and this case is used by those under the influence of drugs or alcohol involves "general consideration of supposed public interest" rather than the explicit laws and legal precedents required by *W.R. Grace.* The parties here have not cited the court to any statutory or regulatory statements requiring termination of employees like these. Indeed, Rule 8 of the Agreement, which is not challenged here, clearly provides that the Company has explicitly agreed to give a warning to an employee who reports to duty *under the influence* of alcohol or narcotics rather than immediately terminate him or her. If a court's analysis of workplace safety is to govern the outcome, a court would have to be prepared to invalidate the explicit discipline provided by a rule like Rule 8 since an employee under the influence

is far more imminently dangerous to workplace safety than the incidents here. Other caselaw from the Fifth Circuit has recognized that the duty or public policy of providing a safe workplace is not alone sufficient to justify a court in voiding a collective bargaining agreement as interpreted by an arbitrator. *Johns-Manville Corp. v. International Ass'n of Machinists*, 621 F.2d 756 (5th Cir. 1980.

I, therefore, conclude that the contract as interpreted by the Arbitrator is not contrary to public policy.[11]

DATED at Portland, Maine, this 17th day of January, 1986.

/s/ D. Brock Hornsby
D. BROCK HORNSBY
United States Magistrate

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[11] I would reject the Company's argument, Petition for Vacation of Award of Arbitration, ¶ 15, that the award must be vacated because "the Arbitrator refused to accepted and consider relevant judicial precedent published after filing of post hearing briefs with the Arbitrator (and also refused to consider S.D. Warren's reply brief). . . ." The Arbitrator like a court, must be able to invoke cloture on proceedings so that she may issue a decision.

I have not addressed the argument whether the Arbitrator improperly declined to consider certain evidence or whether she properly interpreted the so-called *Greenlaw* award, a previous arbitral decision involving the Company and the Union.

APPENDIX D

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

Case Number: 1130-0908-84

IN THE MATTER OF THE ARBITRATION BETWEEN
S. D. WARREN COMPANY
CUMBERLAND MILLS

—and—

UNITED PAPERWORKERS INTERNATIONAL UNION
AFL-CIO, CUMBERLAND MILLS LOCAL 1069

AWARD OF ARBITRATOR

The Undersigned Arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated June 1, 1983 and having been duly sworn and having duly heard the proofs and allegations of the Parties. AWARDS as follows:

The grievances of Kimberly Denis, Debra Graham and Linda Willoughby are sustained. The Company is directed to reinstate each of them with full back pay, seniority and benefits, minus interim earnings, if any, and minus pay for nine months in the case of Ms. Graham, seven months in the case of Ms. Denis, and four months in the case of Ms. Willoughby. The latter deductions shall stand as unpaid suspensions on their records. The Arbitrator shall retain jurisdiction with respect to the remedy for a period of three months from the date of the Award.

The grievance of Marshall Buhelt is denied.

/s/ Suzanne Butler Gwiazda
Arbitrator's signature (dated)
SUZANNE BUTLER GWIAZDA
September 19, 1985

STATE OF)
) ss.:
COUNTY OF)

On this day of , 19 , before me personally came and appeared to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

S.D. WARREN COMPANY
CUMBERLAND MILLS

—and—

UNITED PAPERWORKERS INTERNATIONAL UNION
AFL-CIO, CUMBERLAND MILLS LOCAL 1069

ARBITRATION OPINION & AWARD

AAA # 1130-0908-84

Grievance 84045 (Denis); 84048 (Willoughby); 84049 (Graham); 84058 (Buhelt)

Dated: September 19, 1985

The undersigned Arbitrator, designated by the American Arbitration Association pursuant to the terms of the above-named parties' June 1, 1983 Collective Bargaining Agreement, held hearings in Westbrook, Maine on February 1, April 12 and 13, May 1, 2, 3 and 20, and June 21, 1985. Witnesses were sworn. The undercover agent testified under subpoena. Post-hearings briefs were submitted by both parties, and the record was declared closed August 12, 1985. The parties agreed to a sixty-day deadline from the close of the record for the issuance of the Award.

APPEARANCES:

Counsel for the Company:

S. Mason Pratt, Esquire
Pierce, Atwood, Scribner, Allen, Smith & Lancaster

Counsel for the Union:

Stephen Sunenblick, Esquire
Sunenblick, Fontaine & Rubin

Attending Counsel for the Maine State Police Department:

Chris Katucki, Esquire

Witnesses for the Company:

Peter Malia, Industrial Relations Manager
Bedford C. Hayes, Director of Safety & Security
Roger A. Barr, Benefits Manager
Timothy A. Berry, Undercover Agent
Gary Snow, Lieutenant, Maine State Police
William B. McClaran, Professor, Law Enforcement Technology
Judson Smith, Ph.D., Clinical Psychologist

Witnesses for the Union:

Kimberly M. Denis, Grievant
Debra M. Graham, Grievant
Linda S. Willoughby, Grievant
William Carver, President, Local 1069
Daniel Parks, Recording Secretary, Local 1069
Brian Williams, Chief Steward, Local 1069
Gary Cook, International Representative
John Bishop, Ph.D., Clinical Psychologist
James Lyna, Employee Assistant, Maine Workmens Compensation Commission

THE ISSUE:

The issue agreed-upon for submission is:

"Did the Company violate the Collective Bargaining Agreement in discharging the Grievants, Marshall Buhelt, Kimberly Denis, Debra Graham and/or Linda Willoughby? If so, what shall be the remedy?"

THE AGREEMENT:

The June 1, 1983 Collective Bargaining Agreement provides in pertinent part (JX 1):

> ARTICLE 4 MANAGEMENT RIGHTS
>
> The Company reserves the sole right to manage the business of the Company and its Cumberland Mills operation and to direct the working force. This right includes but is not limited to the right to . . . demote, transfer, discipline, suspend or discharge employees for proper cause. . . .
>
> APPENDIX A COMPANY POLICIES AND MILL RULES
>
> 7. *Causes for Discharge*
>
> In any organization, certain rules of conduct must be observed by the members for the good of all.
>
> Violation of prescribed rules are cause for disciplinary action of varying degrees of severity.
>
> Violations of the following rules are considered causes for discharge:
>
> a) Possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs. The possession or use of a specific narcotic or drug properly prescribed by a licensed physician is the only exception to this rule.
>
> b) Smoking upon Company's premises except in authorized smoking areas, as provided under "Smoking."
>
> c) Unauthorized destruction or removal of the Company's property.
>
> d) Refusal to comply with Company rules.
>
> e) Willful disobedience or insubordination.

f) Neglect of duty.

g) Disorderly conduct.

h) Dishonesty.

i) Obvious sleeping on duty.

j) Deliberate waste of Company time and/or material.

k) Leaving the Mill while on duty except by permission of Foreman . . .

l) Violation of certain safety rules specifically noted in the Mill Safety Rules.

m) Incarceration, after being sentenced.

n) Giving or taking a bribe of any form to obtain work, retain a position, or obtain any preferential treatment whatsoever.

8. *Causes for Discharge After Appropriate Warning*

a) Reporting for duty under the influence of alcohol or narcotics.

b) Reading unauthorized material while on duty.

c) Repeated failure to report for duty without good and sufficient reason.

d) Failure to report injuries to Foreman, and when so instructed to Medical Department.

e) Habitual lateness in report for work.

f) Failure to wear and/or use prescribed protective clothing, devices or equipment.

g) Failure to follow safe work practices.

COMPANY SAFETY POLICY AND STANDARDS:

26. *Intoxicants—Liquor or Drugs*

a. *Bringing in or consuming liquor or drugs on Company property is absolutely forbidden.*

b. *An employee will not report to work under the influence of alcohol or drugs.*

c. If an employee is suspected of being under the influence of liquor or drugs, the Company may require a medical examination by the mill physician. Note: Those employees who may have a problem in this area are encouraged to seek assistance through the Employee Assistance Program.

BACKGROUND:

On February 15, 1984, S.D. Warren Company's Cumberland Mills in Westbrook, Maine (hereinafter "the Company") announced the termination of twelve employees for violation of the contractual rule against possession, use or sale of alcohol or drugs in the mill (Appendix A, Section 7(a), hereinafter "Mill Rule 7(a)"). Among those discharged were the four grievants in this case: Kimberly Denis, Debra Graham, Linda Willoughby, and Marshall Buhelt (deceased in May, 1984). Briefly summarized, the events which led up to the discharge action were as follows:

Sometime in 1982, rumors of drug activities in the mill came to the attention of the Company and U.P.I.U. Local 1069 (hereinafter "the Union"). Both parties were concerned. The Company approached local and federal investigative authorities before it succeeded in gaining the cooperation of the Organized Crime and Drug Anti-Smuggling Unit of the Maine State Police Department (hereinafter "the State Police Drug Unit").

On March 29, 1983, Lt. Gary Snow, Commanding Officer of the State Police Drug Unit, informed the Company by memorandum that a "mutual commitment" had been reached to fund a six-month investigation at the mill using an undercover agent who would be under the

direct supervision of the State Police, but who, "upon completion of the investigation, . . . would make himself available to the S.D. Warren Company for any administrative matters that resulted from his work." (JX 7)

On or about October 10, 1983, Timothy Berry was hired under the name "Al" Berry to work as an entry-level employee in the mill while acting as an undercover investigator of drug and alcohol activity among mill employees. Agent Berry had been in police work since 1974 as a patrolman or as Chief of Police in South Berwick, Maine. He had received some training in drug investigation at the Criminal Justice Academy and, before he commenced the S.D. Warren investigation, he took a two or three-week course in undercover operations. When he began working at the mill, he told co-workers that he was single or divorced, that he loved to party and "get high." He made a point of asking as many people as possible where he might find "weed" or other drugs. Where he received the impression that the person had no knowledge whatsoever, he left that employee alone and continued to pursue those whose replies gave him to believe that they might lead him to the information he sought. He was transferred to different areas of the mill to facilitate his efforts, but very few people in management knew that he was an undercover agent, and Union leaders were not informed on grounds that knowledge would put them in an awkward position vis-a-vis their membership.

In November, Agent Berry began making marijuana transactions in the mill with the four grievants in this case. Specifically, on November 3, 1983, he obtained ⅛ ounce from grievant Denis. On November 13, he obtained 5.5 grams from grievant Buhelt. On December 3, he obtained four "joints" and simulated smoking one of them with grievant Buhelt. On January 12, 1984, he obtained 2.6 grams from grievant Graham. And on

January 30, 1984, he obtained one "joint" from grievant Willoughby. Agent Berry attested that he wrote an account of each transaction after work that evening and kept the marijuana obtained in a briefcase in his car until he submitted it to the state laboratory for analysis. Eventually, his written reports were given to the Company where they formed the basis for the discharges. (CX 9-14)

Following agent Berry's testimony, the Company called the three living grievants. Although each differed with certain details in Berry's account of their behavior, suffice it to say here that all three conceded that they did provide marijuana to him in the mill and that they knew it was a dischargeable offense under Mill Rules. Their explanations were essentially similar—i.e. that each was the only female worker in her area of the mill, that "Al" Berry was exceptionally sympathetic and helpful to her (unlike many of the other men with whom she had to work), that he was the first to bring up the subject of marijuana, that he talked about it incessantly to the point where each concluded that maybe if she satisfied his persistent requests, he would leave her alone. All three denied bringing marijuana into the mill for their own use or to using it there themselves.

One employee, not among the twelve discharged, Brian Williams, attested that "Al" Berry asked him about marijuana perhaps as many as ten to twelve times in a two-week period in February of 1984 in spite of his (Williams') "definite no" response each time. One night he saw Berry run his platform truck into a ramp post, flipping it over and throwing Berry to the floor. He said that Berry got up holding his chest as if he were in pain but, when asked if he was alright, Berry responded that he would be "as soon as he got some more 'wacky-tobaccy' in him." When Berry was offered some coffee, he asked if there weren't "something stronger," but Williams laughed it off assuming Berry was joking.

There was considerable expert testimony given at the arbitration hearing surrounding the behavior of agent Berry while he was working under cover and the response of the grievants. Briefly, Company witnesses with extensive police experience, Lt. Gary Snow and William McClaran, attested that it is standard operating procedure for an undercover investigator to color himself in ways intended to mislead, and that in their opinion, agent Berry's friendly persistence in the mill did not amount to entrapping behavior. Similarly, Company witness psychologist Dr. Judson Smith, reviewing agent Berry's written reports, concluded that the grievants all perceived Berry as a peer (not as an authority figure) and that all were free to refuse his requests for "weed" if they wanted to. Where grievant Buhelt was concerned, he noted that "if *any*one was 'entrapped,' it was Berry, not Buhelt."

Expert testimony for the Union differed. Dr. John Bishop, psychologist, opined that the female grievants were not as "free" as Dr. Smith would have the Arbitrator believe. Citing the well-known Yale "Milgram Studies," he noted that each grievant was working alone surrounded by male employees and that each could hardly help feeling grateful and somewhat beholden to agent Berry, an older man who was exceptionally helpful. Just as conditions in the experimental laboratory conspired to induce the Milgram subjects to administer potentially lethal shocks to a stranger, these working conditions, in his opinion, induced the women grievants to comply with Berry's persistent requests for cooperation. He doubted that under "normal" conditions, any of them would have behaved the same way.

It is agreed that the parties jointly administer an Employee Assistance Program (hereinafter "the EAP") which is designed to refer employees with personal problems, including drug or alcohol abuse, to medical and counseling services on a confidential basis. Designated

Union leaders and management officials act as EAP coordinators. The program brochure emphasizes the voluntary nature of the program and warns that (UX 2):

> "If you have a problem and don't seek help from EAP, you will be judged the same way all employees are judged; on the basis of job performance, attendance, tardiness, and other established mill rules and standards."

Whereas the EAP is primarily a voluntary program, many employees during the past ten years have been required to enter it on a "last-chance" basis where their work performance warranted discharge, but it was hoped that they could correct the underlying problem—often alcohol or substance abuse. The particular performance problem took various forms, but the most common was absenteeism, and the current Agreement contains a specific provision (Appendix A, Section 27, Mill-Wide Absentee Control Procedure) where compulsory EAP counseling begins after six incidents of absenteeism in twelve months.

The Facts With Respect to Kimberly Denis

Grievant Denis was hired on or about December 17, 1980, shortly after she graduated from high school. She attested that she grew bored with truck driving and wanted to make more money. Eventually she persuaded management to let her try a job no woman had held permanently before—that of Second Hand in the Release Department working on #35 stack. She liked it and stayed on, sometimes making $66 to $88 a week in bonus. Except for a woman truck driver, she was the only female employee working in the area. She described her relationship with male co-workers as generally amicable, although one fellow employee "stuffed her cig" with a firecracker which blew up in her eyes, and several of her partners were difficult to get along with. She noted that any co-worker could make life miserable for her, and she

was especially dependent on whomever was her truck driver insofar as the driver could select good or bad rolls of paper to bring to her, and bad rolls would reduce her bonus.

Sometime in October, 1983, agent Berry was assigned to the position of truck driver in Ms. Denis' department, and he met her delivering rolls to her work station. It was Mr. Berry's testimony that in their various conversations, he asked her "what she was on" because she appeared to be "high." She told him she had been smoking marijuana all day. He asked her if she had any on her or if she knew where he could get some. According to Berry, Ms. Denis replied that she did not have any with her, but she would get him some if he would give her some money. He gave her $20.00. When she said the next day she couldn't get any until Saturday, he said he wouldn't be around Saturday and asked if she knew anyone else in the mill from whom he could get it. She said she did, took the money, and went towards the Coater Cutter Room. A few minutes later, she returned and said she'd have the marijuana for him in a while. When he asked later, she said she had put it inside the core of a roll which she pointed out. He reached in and pulled out a small bag of marijuana wrapped in a paper plate. He pocketed the bag and kept it in his automobile until he submitted it to the Maine State Chemist for testing. After work, he wrote an account of the transaction and submitted it for review and typing by the State Police Drug Unit. (CX 9)

Grievant Denis denied that she "possessed," "sold," or "gave" marijuana to agent Berry in the mill. She attested that Mr. Berry asked her at least three to five times if she could get him some marijuana before she accepted $20.00. Before that she kept replying, "maybe" or, "I don't know." Then she kept telling him she would try (although she didn't try) or that she just hadn't gotten it. She kept offering him back the $20, but he

wouldn't take it. She acknowledged calling her boyfriend, but denied using the word "supplier" or having a supplier as such.

Eventually, Ms. Denis attested, Mr. Berry asked if she knew Miller Hunt. When she said yes, he asked if she would take $10.00 to Miller and ask if Miller would sell some weed to him (Berry). Ms. Denis said she went over to Hunt in the Coater Cutter Room and asked if he'd sell Berry $10 worth of marijuana. Hunt said yes; he'd come over later. Subsequently Hunt told her he had put the marijuana in a roll wrapped in paper. When Berry asked her about it, she pointed towards the roll, saying she believed it was there.

Ms. Denis could not deny ever using marijuana privately, but she denied using or selling it in the mill. She said she felt pressured by Berry because he was "always bugging me; what could I do?" In addition, Berry had been exceptionally nice to her, bringing her good paper rolls, and coffee, and hamburgers when she was too busy to get lunch. They would even "bum butts" from each other. She rejected his suggestion that they go out socially, however, on grounds she had a boyfriend, and she declined his request for her phone number and his suggestion that he might get marijuana from her boyfriend. Frequently they would arrive simultaneously and would walk in to work together. When he became her "roll man," or truck driver, he would help her peel bad rolls or to manage a big roll. Since he was so helpful, she naturally wanted to "stay on his good side."

Ms. Denis recalled further that agent Berry asked her four or five times to smoke marijuana with him—twice in the mill, the rest outside. She refused on all occasions, she said, telling him that she didn't smoke in the mill. These suggestions were occurring about the same time she had his $20.00. She was being seen talking to him so much, people were asking if she was going out with him, but she didn't want to alienate him by rejecting his

friendship. "If I wasn't nice to him, he could be hard on me. Like a lot of men do—sit and laugh. Some have pulled out tickets, and I'd think it's a good roll, but then it would stave up the machine."

Agent Berry stated that he did not know Miller Hunt on November 3, 1983; it was Ms. Denis who mentioned his name and later introduced him. He called that Denis looked pale, had bloodshot eyes on occasion, and she *said* she'd been smoking pot all morning. He denied asking her out for a drink (she asked him instead) and said buying coffee for fellow workers was commonplace. As to how many times he asked Ms. Denis about marijuana, he never counted, but it was "perhaps two or three times."

The Facts With Respect to Debra Graham

Grievant Debra Graham was hired by the Company on August 22, 1983. She first met agent Berry sometime in October, 1983 while they were both working in the Material Handling Department. It was agent Berry's testimony that on January 12, 1984 Ms. Graham approached him saying she'd heard he'd been trying to buy some marijuana; she had some on her, and did he want to buy any? He said yes, and together with a male co-worker, they went down the hallway to make the transaction. According to Mr. Berry, Ms. Graham took a bag from her purse and said she wanted $7.00 a gram. He said he wanted four grams and had only $30.00 with no change, so she should keep the extra $2.00. He purchased four grams[1] and submitted the marijuana with his written report to the State Police.[2] (CX 12)

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[1] The state chemist receipt indicates that 2.6 grams were received on January 16, 1984. There is no evidence with regard to this disparity.

[2] Agent Berry attested to a second purchase of marijuana from Debra Graham on January 20, 1984. It is clear from the testimony and the report (CX 13), however, that transaction took place off mill property, and the Union's objection to the admission of evi-

Grievant Graham denied approaching agent Berry first. It was her testimony that Berry approached her, that she gave him the entire amount, not part, and that she did not put "the rest" back in her change purse as his report indicated. She said she brought the marijuana in to work because he had asked her about it "25 or 30 times" in the time she had known him and she had begun to feel guilty about not cooperating. She said he talked about it repeatedly, although she admitted that she talked about it too. He asked her about the quality of her weed, and she told him "it was just as good as his." But, she said, "I put him off for a long time. I felt bad about it because he'd buy me coffee three or four times a day and he helped me trig rolls. He was very nice—an alright guy, I thought."

The Facts With Respect to Linda Willoughby

Grievant Willoughby was hired by the Company on April 20, 1977. Shortly thereafter, she began working as a Roll Handler in the Winder Room—the first and only female employee in that job. It was Ms. Willoughby's testimony that eventually being the only woman out of approximately fifty-two (52) employees in the Winder Room began to wear on her. In addition to teasing banter, she was under continual pressure from the men to bring them rolls faster. By 1982 she "couldn't take it anymore," and she consulted the Company physician, Dr. Earnhardt, who advised her to take an extended leave somewhere quiet, that "her job would wait for her." He asked if she had anywhere like that to go, and she said she had friends in Jamaica. Shortly thereafter she requested sick leave, and she spent approximately five months in Jamaica recuperating. She was living a distance from Kingston, but she saw a Kingston doctor as required by Company rules and gave him the necessary

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dence regarding this transaction is sustained. The Agreement prohibits possession, use or sale on mill property—not on public streets.

papers to forward to the Company. Evidently he did not do so, and suddenly she received notice that she had been terminated. When she tried to locate the Kingston doctor, he had left for another island. Finally, she returned to Maine, explained her circumstances, and the Company reinstated her on condition that she participate in the EAP program. (CO X 19) She felt rested from her leave, but she returned to work seriously malnourished and underweight, having lost fifty pounds in Jamaica. Seeing Dr. Leavitt pursuant to the EAP program, she was told she was suffering from anorexia nervosa.

Ms. Willoughby returned to work in July, 1983. It was her testimony that she "worked in her own corner of the world," had only one close friend in the mill with whom she might discuss marijuana "once a month at most," and was generally too busy to have much social contact with other employees. She said she first met Berry in "DIC Park" in November, 1983 and after that she ran into him almost daily. He brought her coffee, said how nice she looked, helped her roll paper. She recalled that he was friendly, that he "just talked about drugs, parties, how he enjoyed his alcohol and drugs. He asked me many times if I could get weed for him. About once a week, did I have any? Could I get any? I said no."

It was agent Berry's testimony that he asked Kimberly Denis one day if she had any marijuana, and she said no, but Linda Willoughby in the Winder Room might. Mr. Berry said he went to the Winder Room and asked Linda if she had any, but Linda said she was "busy," and he should "come back later." He did return later, and she gave him enough for one cigarette. Berry said he offered to pay for it, but she waved him off. As with all his transactions, agent Berry submitted the material bought and his report to the State Police. (CX 14)

Grievant Willoughby admitted that she gave a small amount of marijuana to Berry at the mill on January 30, 1984. She disagreed with Berry's written report on several points, however. She recalled that he came to her in the Winder Room five times, not there, as indicated. She denied that the marijuana was in her pants pocket or that she had a quarter ounce on her. Instead, she said, it was in an envelope in her pocketbook, and she gave all of it to Berry; in fact she had brought it in specifically for him on the theory that maybe if she gave it to him, he'd leave her alone. There was no "bag" containing "the rest."

Ms. Willoughby recalled the sequence of events on January 30, 1984 as follows: Berry came to her in the Winder Room at the beginning of the tour saying he'd been working for sixteen hours and wanted a joint to get high. Did she have any weed? Ms. Willoughby said she replied that she didn't know and she was "busy." In fact her job as Material Handler in the Winder Room was often hectic, and she had trucks to unload. He returned about an hour later asking again. She said she was busy and didn't have any. He returned again an hour later, and she said again that she was busy. The fourth time was about 45 minutes later. She said she was busy. Then the foreman asked her why this guy was coming over to her so often; didn't she have any work to do? She told the foreman, "Don't worry. I'll take care of it." When Berry returned a fifth time, she decided she couldn't afford to have him return again, so she went to her pocketbook and gave him enough for one cigarette. When he offered her money, she said she didn't want his money; he could reciprocate some time. But she didn't have time to get weed for other people and he should "*leave me alone*!"

Asked if she hadn't encouraged Berry by saying she was busy and he should come back later, Ms. Willoughby attested that she was hoping that he would get the hint

or forget about it. She said that since her return from Jamacia, she had been trying to get control of her life—which included learning to handle pressures at work. She knew how difficult male employees could make life for her at the mill, and she didn't want to alienate Berry who seemed exceptionally nice. Although she was technically still on the EAP program, she wanted to make her own decision and did not discuss with her EAP counselors Mr. Berry's requests for marijuana. Asked why she didn't tell Berry to see her after work. Ms. Willoughby stated that she had felt herself the object of substantially greater male interest since she returned to the mill fifty pounds thinner, and she was afraid Berry would misconstrue such a suggestion as an interest in dating him.

The Facts With Respect to Marshall Buhelt (deceased)

Grievant Marshall Buhelt was hired by the Company on or about June 19, 1979. It was union president William Carver's testimony that Buhelt worked in his area of the mill for a period where he had a poor work record and an obvious substance abuse problem. Mr. Carver testified that he and a shop steward together urged Buhelt to enroll in the EAP program, but he "just shrugged it off." Later, Buhelt left Carver's work area for other parts of the mill, and Mr. Carver knew little about him except that he was continually filing grievances on safety issues and "seemed always to be in trouble with someone."

Agent Berry met grievant Buhelt in November, 1983 where Buhelt was working as a roll handler in the #3 calendar area of the mill. It was Berry's testimony that Buhelt sold him marijuana on mill property twice, the second time insisting that he (Berry) share one of the joints before he left. Agent Berry drafted a written account of each transaction the same day as it occurred, submitting the report and the marijuana purchased to state authorities as standard procedure. (CX 10; 11)

According to the Union, grievant Buhelt died in May of 1984, a few months after his discharge.

Summary

On February 15, 1984, all four grievants were arrested by the State Police. On the same day, they were terminated by the Company, and the Union was informed of the undercover investigation and the transactions engaged in by the twelve employees being discharged.

The Union grieved the discharges and, failing to resolve them through the step procedure, appealed to arbitration. The present Arbitrator was selected to hear the four grievances herein. A pre-hearing conference was held on February 1, 1985 at which various procedural problems were discussed including the Union's objections to testimony by the undercover agent, on grounds that such testimony would violate certain state confidentiality regulations governing police records. This objection was overruled, and the undercover agent was subpoenaed by the Arbitrator.

The hearings extended over many days from February to June of 1985. Both parties had full opportunity to present evidence, examine and cross-examine witnesses, and both submitted lengthy post-hearing briefs.

The matter is now properly before the Arbitrator for decision.

THE POSITIONS OF THE PARTIES:

The Company

It is the position of the Company that the discharges in this case were all for proper cause, and no violation of the Agreement occurred. The Company contends that all four grievants clearly violated Section 7(a) of the Mill Rules in the Agreement; the three living grievants

(Denis, Graham and Willoughby) admitted it, and deceased grievant (Buhelt) was proved to have done so.

The Company asserts that the Agreement is clear and unambiguous with respect to the penalty for violation of Mill Rule 7(a), and the Arbitrator is without authority to reduce the penalty if a violation is found. In this case, the Company asserts, "once a violation of Mill Rule 7(a) is established, a discharge for violation of that rule must be upheld because if the plain meaning of the contract, past practice, bargaining history and public policy." (Co. Brief p. 5)

None of the grievants were eligible for participation in the EAP program, the Company maintains. The EAP is not a contract right; it is a voluntary program for people who need treatment. None of these grievants (with the possible exception of Buhelt) showed signs of needing treatment for substance abuse. Nor were they terminated for drug abuse; they were terminated for drug *possession and sale* on mill property. There is no evidence the EAP program was ever offered to any employee after he or she was found dealing in drugs in the plant. In fact, this is "a case of first impression" insofar as no employee has ever before been charged with violating Mill Rule 7(a). Moreover, the Company contends, the grievants and the Union were well aware of Mill Rule 7(a). The Union actively supported the no-drugs policy by reminding its membership of the Rule and the penalty of discharge for violating it. In addition, after the *Greenlaw* Arbitration Award [3] issued, the Company "republished its intent . . . to enforce its right to immediate discharge . . ." by posting two notices to that effect, on October 3 and December 10, 1983.

It is the Company's contention that its cooperation with the Maine State Police investigation was reasonable and

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[3] *S.D. Warren Co. and U.P.I.U. 1069*, Arbitrator Lawrence Katz, April 2, 1984. AAA 1130-1175-82.

in good faith insofar as the Company's concern about drug dealing in the mill was grounded in safety considerations and in undercover operation is both more effective and less intrusive than alternative investigative methods such as search and seizure. As to agent Berry's techniques, the Company asserts that it could not supervise him too closely without jeopardizing him and the investigation. In any event, the Company believes Berry conducted his undercover operation properly.

Finally, the Company maintains that the grievants' admitted violations cannot be excused under the "entrapment" defense since that defense has not been proved and is not available for application here in any event. The facts with respect to each grievant do not establish entrapment, the Company argues, insofar as both elements of entrapment, "inducement" and "lack of predisposition" must be found for the defense to succeed.

With respect to inducement; the Company maintains that the burden of proof is on the Union to show, by a preponderance of the evidence, that agent Berry's investigative techniques were outrageously excessive. This was not shown, in the Company's opinion.

With respect to predisposition, it is the Company's contention that once it has shown predisposition, the burden shifts to the Union to rebut. The Company sees evidence of predisposition in the fact that the grievants admitted to using marijuana off-premises, in their ready compliance and active role in arranging the drug sales to Berry, in their obvious familiarity with quality and price of marijuana, and in the fact that they knew who else in the mill was using it. The Union failed to rebut this evidence of predisposition, the Company argues, and thus the entrapment defense fails.

With respect to the Union's efforts to persuade the Arbitrator that the three female grievants were under special pressures because of their isolated status, the

Company maintains that no causal link was established between this fact and the transactions with agent Berry. On the contrary, argues the Company, these women showed themselves to be exceptionally strong-minded individuals by holding jobs in an all-male environment. In this respect, the Company maintains that the consistent testimony of its expert witness, Dr. Judson Smith, is more credible than that of the Union's witness, Dr. Bishop. Dr. Smith saw evidence of strength in the grievants' observable behavior, whereas Dr. Bishop saw weakness "supported only by theories and studies for whose application to this situation he can cite no support." (Co. Brief, p. 98)

"The law presupposes that we act with a free will," the Company asserts, "in fact, that presupposition is the basis for our whole system of laws. . . . The Arbitrator is therefore compelled to assume behavior is not induced, for purposes of enforcing the law, absent compelling evidence to the contrary." (Co. Brief, p. 100) It is the Company's contention that the Arbitrator should evaluate the evidence independently of the conflicting expert testimony since entrapment is a legal issue, not a psychological issue, and the decision should be based on objective evidence in the record, not on contradictory theories of human behavior and motivation.

Finally, the Company maintains that the entrapment defense should not be made available to these grievants, regardless of the emphasis placed upon it by the Union, because police conduct is not deterred by an Arbitrator's finding of entrapment, nor is an individual's freedom from incarceration protected. These are the functions of a court enforcing public law. An Arbitrator's function is to interpret and protect the Collective Bargaining Agreement. In this case, that means enforcing the clear intent of Mill Rule 7(a) which is to enhance safety in the workplace—a social policy mutually supported by both the Company and the Union. If the entrapment defense is

allowed to succeed in this case, the Company urges, "it would send the wrong signal." (Co. Brief, p. 106) Employees would be led to believe that they can bring or use drugs in the mill, and the worst that can happen is that they will be put on a "last-chance" EAP program. This is precisely what both parties do *not* want employees led to believe. Therefore, if the Arbitrator takes it upon herself to reduce the penalty of discharge, she will be reversing not only the Company's intent, but that of the Union as well.

For all of the aforestated reasons, the Company asks that the grievances be denied.

The Union

It is the position of the Union that the discharges of the grievants were not for proper cause. The Union maintains that the discharges were unfair for three reasons: 1) the grievants were improperly induced to bring marijuana into the mill by agent Berry; 2) the Company failed to offer the grievants an opportunity to participate in the EAP program; and 3) the discharge was excessively harsh in light of the Company's past practice of progressive discipline for such serious violations of other Section 7 Mill Rules as theft and insubordination.

With respect to the first argument, the Union asserts that Timothy "Al" Berry was a *Company* employee while he conducted his investigation in the mill, yet he violated several Mill Rules himself without Company disciplinary action. Specifically, he smoked cigarettes in non-smoking areas, he smoked marijuana on mill premises (or, at a minimum, he feigned doing so, in which case he still "possessed" it), and he worked under the influence of some substance which caused him to collide with a guide post while driving a truck in the mill. Most importantly, he continually and repeatedly pressured co-workers to sell him marijuana and/or to smoke it with him. And it was this pressure, the Union maintains, which caused the

grievants ultimately to give in to his requests. Since Berry's behavior at work would be grounds for discharging any other employee, the Union argues, it cannot be used to justify the discharge of employees who were victimized by that behavior.

The Union maintains that it has proved the causal nexus between Berry's conduct and that of the female grievants in particular through the evidence of the grievants' isolation as the only women working in their positions and Dr. John Bishop's expert testimony on the expected effect Berry's pressure would have under these conditions. Three elements are important, the Union asserts: 1) Berry's conduct occurred not "on the street" where the grievants were free to avoid him, but in the workplace where they had to deal with him as a co-worker; 2) not only did they have to cope with Berry as a co-worker, they had to cope with the fact that he was a man in an overwhelmingly male environment and therefore in a position of considerable power. He could easily make life difficult for them and probably with impunity; 3) Berry exploited his position of power by using ingratiating and sophisticated misrepresentation techniques such as flattery, the purchase of small favors, personal confidences about his private life, requests for social meetings after work, and the like. Linda Willoughby was particularly vulnerable, the Union argues, because she was ill and still under EAP treatment while Berry was pressuring her. Kimberly Denis had previously turned in male co-workers for serious violations of Mill Rules and then found herself having to live with those men when only minor discipline was meted out. All had a "Hobson's choice;" they could put up with Berry's harassment and work harder to win approval, or they could report it—and probably have to work harder yet to win *back* approval.

It is the Union's contention that the testimony of *both* psychologists supports its case. Not only do the Milgram

experiments cited by Dr. Bishop explain why the grievants were unable to withstand the repeated requests for compliance with Berry, but the "diad/triad" theory expounded by Dr. Smith explains it as well because the female grievants *had* no other women working in their area with whom they could form such supportive relationships.

The Union asserts that, while it has met the standard of proving "entrapment" in this case, it should not be held to that legal standard. Instead, standards of demonstrating "provocation" should be applied, and the Arbitrator should find that the grievants were provoked by an agent of the Company in much the same way as grievants have been found provoked by abusive or derogatory slurs made by their supervisors in numerous arbitration cases on insubordination. The Union summarizes (Union Brief, pp. 32-33):

> "The principles garnished from these cases are directly applicable to the present grievances. Given the position of the grievants and the particular circumstances surrounding their work environment, it is clear that S.D. Warren, through 'Al' Berry, induced them to violate the Collective Bargaining Agreement provisions. Whether it is toxic fumes or excessive noise causing someone to leave their job, or whether it is the foreman provoking employees into fights, or whether it is an employee or its agent using every imaginable tactic to induce grievants to violate the Collective Bargaining Agreement, the same results should follow. No termination is just when induced and/or provoked by the employer's actions."

With respect to the second argument, the failure to offer a "last-chance EAP opportunity" to grievants, the Union argues that the EAP program was found by Arbitrator Katz in the *Greenlaw* decision to be a *joint* program geared towards helping troubled employees solve their problems before they lose their jobs—and that it has

been offered on a last-chance basis in lieu of discharge in the past to many employees with extremely poor work records. Most such last-change agreements (UX 10-26) have benefited everyone, the Union asserts; the employee has improved and saved his job; the Union has retained a member, and the Company has retained the services of an experienced worker.

The *Greenlaw* decision also stated as follows (UX 1, p. 14, FN 4, cited in Union Brief, p. 41, emphasis added):

> "I am not suggesting that the Company is irrevocably bound for the indefinite future to offer EAP to all 'troubled' employees who are about to be discharged. The Company may initiate a policy whereby it strictly enforces its right to discipline and discharge employees for misconduct occurring before they enroll in the EAP. *However, before such a change is initiated, the Company must provide sufficient advance notice to the Union and employee.*"

It is the Union's contention that the Company never notified either the grievants or the Union about any impending change in policy regarding progressive discipline.

It is the Union's further contention that the grievants were fully eligible for the EAP program inasmuch as the Policy Statement explaining the purpose of the program in the brochure specifically states that the program is for employees who have problems affecting their "attendance, *safety*, or productivity." (UX 2, cited in Union Brief, p. 42, emphasis added) Inasmuch as the Company grounds its no-drugs policy in safety considerations, employees violating the policy have a problem affecting their safety by definition—and, hence, are prime candidates for EAP counseling before they lose their jobs.

The Union also argues that no one before these grievants has been discharged prior to being offered opportunity to participate in the EAP program. Moreover, the results of most last-chance EAP agreements have been

extremely favorable with the majority of employees conquering even alcohol abuse—something Dr. Bishop said is more difficult to accomplish than conquering marijuana abuse. The reason for the disparately harsh treatment of these grievants, the Union surmises, is simply that the Company is more familiar with (and tolerant of) alcohol than it is with marijuana. Nevertheless, the Union argues, "The personal bias that mill management have demonstrated in favor of alcohol should have no bearing on the application of the EAP policy. The failure to offer this program to the grievants constituted a violation of the Collective Bargaining Agreement." (Union Brief, pp. 44-45)

Finally, with respect to the third contention, that discharge is inconsistent with the past practice of imposing progressive discipline, the Union argues that employees have violated virtually every provision of Section 7 in the Mill Rules—all without termination. These have included incarceration, leaving the mill while on duty, smoking in restricted areas, dishonesty involving surreptitious removal of Company property, willful disobedience, insubordination, disorderly conduct involving fighting, obvious sleeping on duty, and refusing to comply with Company rules by sexually harassing female employees. (UX 27 and 4a-d) The longest suspension on record is six months imposed on two employees found to have stolen approximately $25,000 from the Company.

The Union rejects any contention that Mill Rule 7(a) is somehow different from the rest of the many provisions in Section 7. The language itself makes no such distinction, and even alcohol-related offenses, including possession and apparent use on mill property, have been disciplined progressively. "In short," the Union concludes, "all Section 7 violations received previous warnings before individuals were given any kind of lengthy suspension and all termination cases were offered participation in the EAP." (Union Brief, p. 48) Moreover, aside from

analyzing an employer's progressive discipline system, arbitrators have taken into consideration an employer's culpability in provoking the incident when overturning or reducing discharge penalties.

For all the aforestated reasons, the Union asks that the grievances be sustained. With respect to remedy, the Union asks that the three living grievants be reinstated with full back pay and benefits dating from their terminations on February 15, 1984 and that the estate of deceased grievant Buhelt be appropriately compensated.

OPINION:

The Agreement: Plain or Ambiguous?

The Company maintains that "Mill Rule 7(a) provides for immediate discharge." (Co. Brief, p. 3) It substantiates this position on four grounds: "the plain meaning of the contract, past practice, bargaining history and public policy." (Co. Brief, p. 5) Let us examine these in turn.

First, is the meaning of the contract plain? I cannot find that it is. Granted Section 7 of the Mill Rules is titled "Causes for Discharge," but there is no verb used. It does not say whether such causes "*will* be" or "*may* be" ground for termination. The title is then followed by two separate sentences (JX 1, emphasis added):

> "Violation of prescribed rules are cause for disciplinary action *of varying degrees of severity.*
>
> Violations of the following rules *are* considered causes for discharge."

These two sentences heighten, rather than clarify, the ambiguity of the title. *Will* violation of Section 7 rules invariably be penalized with discharge or not? It is not clear.

Nor do I find the Company's position supported by reading Mill Rule 7 in conjunction with Mill Rule 8 or

with Company Safety Policy. Mill Rule 8 simply adds that certain other violations are "Causes for Discharge After Appropriate Warning." Again, no verb is used in the title; we still do not know whether the parties agreed such violations "will be" or "may be" causes for discharge. We only know that those employees are guaranteed at least one warning before they are terminated. Finally, we find the verb "may be" used in Company safety Policy handbook (CX 16, p. 4, emphasis added):

> ". . . violations of rules printed in red *may* mean immediate discharge. Violations of other rules *may* be cause for discharge after appropriate warning."

The ambiguity of the verb "may be" is further heightened when we find that the rules printed in red include *both* Mill Rule 7(a) and 8(a) (CX 16, p. 16):

> "26. Intoxicants—Liquor or Drugs
>
> a. Bringing in or consuming liquor or drugs on Company property is absolutely forbidden.
>
> b. An employee will not report to work under the influence of liquor or drugs."

The Company argues that the combination in red of rules distinguished in the Agreement demonstrates that "the safety standards err on the side of the strictness and not leniency." (Co. Brief, p. 5) I would agree were it not for the fact that *the Company* used the phrase *"may* mean immediate discharge" in explaining the intent of red print in its safety booklet. Inasmuch as the safety booklet is a unilateral statement of Company policy, not a negotiated agreement with the Union, the Company had full opportunity to state that violations of rules "in red" *will* mean immediate discharge. Instead, it chose to retain discretion over such decisions by using the word "may." In so choosing, it allowed a third party neutral the same discretion when reviewing the propriety of those decisions.

Second, the Company argues that "past practice" supports its contention that the meaning of the Agreement is plain. Again, I cannot agree. The Company relies almost exclusively on various notices which have been posted in the mill or newsletter statements made by the Union. Setting these aside for the moment, I note that "practice" means something other than "notice." It means what has been *done* rather than what has been *said.* What has been done when employees have violated Mill Rule 7 in the past? The record shows that the vast majority of Rule 7 violations have been penalized with something less than immediate discharge. To be specific, other than the cases at hand, of the forty-one (41) identifiably Rule 7 violations in the record, only two (2) such violations have been penalized with immediate discharge, and both involved incarceration for serious crimes (manslaughter and incest, according to unrebutted Union testimony). (JX 10, UX 10-26, 27) The Arbitrator has charted the seventy-five (75) disciplinary actions and sixteen (16) last-chance EAP agreements submitted by the Union according to severity of penalty to see whether a pattern of progressively severe discipline for progressively serious employee misconduct exists. It does not. Even where prior warnings have been given, mere verbal warnings for such Rule 7 violations as sleeping (7(i)), smoking in restricted areas (7(b)), and leaving the mill without permission (7(k)) have been given. (UX 27) Similarly, at least eight (8) written warnings have been issued for Rule 7 violations such as sleeping, smoking, leaving without permission and insubordination (7(e)) and disorderly conduct (7(g)). No fewer than eighteen (18) suspensions (sometimes accompanied by a demotion or probationary period) have been meted out for Rule 7 violations. The suspensions have ranged from one day for insubordination, to sixty (60) days after violating an earlier last-chance EAP agreement by drinking on the job—to the maximum of six months for embezzlement of as much as

$25,000.[4] Finally, last-chance EAP agreements have been given to at least six (6) employees found to be violating Rule 7. One was given after incarceration (7(m)), three after violation of Rule 7(d) (refusal to comply with Company rules) and/or Rule 7(e) (insubordination) and 7(f) (neglect of duty), and two after apparently violating the rule at issue here—Rule 7(a). These latter last-chance agreements involved one employee with an alcohol problem. It was the uncontradicted testimony of union president William Carver that this man was given his first last-chance EAP agreement in 1981 (UX 25), but he violated it by drinking at work to the point where he would pass out before the end of the shift. On May 27, 1982, he was placed on a 60-day suspension, with reinstatement conditioned on his maintaining "total sobriety" during the suspension, strict adherence to EAP counseling and treatment including antabuse if prescribed, attendance at weekly AA meetings, and certification for fitness to return to work by Company doctor. (UX 23)

If any pattern emerges from an examination of past practice where Mill Rule 7 violations are concerned, it is the Company's consistent effort to help employees redeem themselves before they suffer the loss of thir jobs. Some might disparage this as leniency, but there are strong arguments that salvaging experienced workers is sound, cost effective, business practices. Whatever the case, it has been the Company's chosen approach even where violation of Mill Rule 7(a) was involved.

This is not to say that the matter of notice is irrelevant, however. Notices may not constitute a past practice, but they do exist in the record, and the ques-

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[4] Unlike the other penalties, written documentation of the six-month suspension is not in the record. Union President William Carver's testimony that two employees were given this penalty for embezzlement was unrebutted, however, and "dishonesty" is a violation of Mill Rule 7(h).

tion arises as to whether they constituted the notice of a change in the Company's intent which Arbitrator Katz said would be necessary if the Company wished to alter its practice of warning employees before discharging them for most Rule 7 violations. Two notices were posted after the *Greenlaw* decision was issued in April of 1983: one was posted on or about October 4, 1983 (CX 7b), and the second was posted on or about December 10, 1983. (CX 7c) In addition, the Union put out a newsletter in October, 1983 which included warnings about the no-drugs policy. (CX 17) Let us examine them in chronological order:

The October 4, 1983 notice stated as follows (CX 7b):

> "ALL OF US MUST RECOGNIZE THAT THE USE, SALE, AND POSSESSION OF ILLICIT DRUGS IS A PROBLEM IN ANY ENVIRONMENT, ESPECIALLY THE WORKPLACE. FAILURE TO RECOGNIZE, AND COMBAT THIS PROBLEM EFFECTIVELY, ONLY LEAVES THE DOOR OPEN TO THAT SMALL MINORITY WHO VIOLATE THE LAW, AND MILL RULES, WHICH ARE DESIGNED TO PROTECT ALL OF US FROM EXPOSURE TO THE OBVIOUS DANGERS OF SUCH ACTIVITY.
>
> THIS NOTICE IS ISSUED TO REMIND ALL EMPLOYEES THAT WE ARE COMMITTED TO THE CONCEPT, THAT ILLICIT DRUGS OR INTOXICANTS WILL NOT BE TOLERATED IN THE WORKPLACE, WHETHER BY USE, POSSESSION, SALE OR REPORTING UNDER THE INFLUENCE. SUCH INFRACTIONS MAY LEAD TO IMMEDIATE DISCHARGE.
>
> PLEASE TAKE THE TIME TO READ AND UNDERSTAND THIS MESSAGE, AND MORE IMPORTANTLY—HELP US TO KEEP *OUR* WORKPLACE FREE OF DRUGS AND INTOXICANTS."

This notice states that "such infractions *may* lead to immediate discharge" whereas in an earlier notice, posted October 30, 1981, the statement was made "that any person violating these rules *will* be discharged." (CX 7a) Additional ambiguity arises where the Company included "reporting to work under the influence" (a Rule 8 violation), in both notices. (CX 7a & b)

The timing of the October 4, 1983 notice is significant in that it was posted after the *Greenlaw* decision and about the time that agent Berry began working in the mill. It was industrial relations manager Peter Malia's testimony that very few members of management were informed of the investigation underway, and the Union was told nothing on grounds that knowing would put Union leadership in a difficult position. This sensitivity was commendable, in my opinion, and its continuance will benefit the labor relationship in the long run—but in this instance it clouded the message the Company was trying to convey. Now that we all know about the investigation, the Company attempts to read meaning back into the notice which is not apparent on its face. The Union could not be expected to "get the hint" when it knew nothing of the undercover operation, especially when the language used in the notice was routine in tone and more equivocal than one previous. The same applies to the Union newsletter issued in October, 1983. The October, 1983 Union newsletter covered a wide range of Union business, including the following reminder (CX 17):

> "Once again it is necessary to remind everyone that the use of illegal drugs and/or alcohol is a very serious offense. The company has notified the union that anyone caught possessing and/or using drugs or alcohol on company property will be immediately terminated. And their position is very strong on this. The union can only hope that everyone will follow these rules and not jeopardize their job, their

> families, or the safety of their fellow workers. We already had two employees discharged this past summer."

At first glance, this statement makes it appear that the Union had been put on notice of an absolute "*will*-be-terminated" position on the part of the Company. On second glance, however, the Union acknowledges its long-standing support of the no-drugs policy *per se*, and the newsletter can be viewed as a routine reminder similar to those in the orientation speeches made by the union president to new employees. The Union denies that it was given any notice of a Company intention to interpret Mill Rule 7(a) henceforth as *requiring* immediate discharge or of an intention to administer the progressive discipline differently where 7(a) violations are involved. There is no Company testimony that a special meeting with the Union was held, and Bill Carver was uncontradicted that normally the Company informs the Union of changes at Third Step meetings when international representative Gary Cook is present, or at a meeting with the Union Executive Board.

The December 10, 1983 notice is similarly open to interpretation. It stated as follows (CX 7c):

> "Recently an employee entered a closed, locked shop area, used a saw which is restricted for 'Authorized Personnel Only', and amputed parts of three fingers. While the bodily injury was certainly sad and needless, the pain and suffering accompanying the termination of this employee was also very regretable. It is an extremely difficult time for both the employee and the Company.
>
> We must remind ourselves that Mill Rules, including unauthorized use of equipment, possession/use/sale of alcohol or other drugs, and theft of Company property, cannot be ignored. They apply to all employees, hourly or salaried, and we must expect

full understanding, acceptance, and compliance by everyone.

Failure to comply with these specific rules will result in termination."

Admittedly, this notice concluded with the statement that "Failure to comply with the specific rules *will* result in termination," but too much reliance cannot be placed on the use of one word in one Company notice where negotiated language in the Agreement is ambiguous and prior Company notices have not been consistent in the use of that word. Moreover, the main thrust of the notice dealt with an employee who amputated three fingers using restricted equipment without authorization, and possession/use/sale of *alcohol*, and theft were also included among the "specific rules" not to be ignored.

In short, there is too much mixing of rules and too much room for misunderstanding in the post-*Greenlaw* notices to conclude that the Union and employees knew or should have known that henceforth possession, use or sale of drugs in the mill would invariably result in immediate termination. All they knew was what had been understood for some time: the Company *could* consider it grounds for severe penalty including discharge—as stated in Mill Rule 7 of the Agreement.[5]

Third, in addition to plain language and past practice, the Company argues that bargaining history supports its position that the Agreement is clear and cannot be altered by the Arbitrator. Here the Company points to the Union's proposal during the 1983 contract negotia-

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[5] It should be understood that finding no *Greenlaw* notice had been given prior to the discharges is not a finding that the Company cannot give this notice in the future. Quite the contrary, I concur in Arbitrator Katz's conclusion that the Company retains the right to inform the Union of its fixed intention to discharge violators of Mill Rule 7(a) henceforth. As Arbitrator Katz put it, however, the notice must be "sufficient" and that test the Company has yet to meet.

tions to move subparagraphs other than 7(a) in Section 7 of the Mill Rules to Section 8 where violation would subject the employee to termination only after appropriate warning. (CX 15) Since 7(a) remained in Section 7 even in the Union's proposal, the Company contends it is apparent that, "by implication, the intent of both parties was to leave 7(a) offenses punishable by immediate discharge." (Co. Brief, p. 10) The difficulty with this line of argument is precisely as the Company states; it is reasoning "by implication," and implication is a weak reed to rely upon in contract interpretation, especially where a negative is involved. In this instance, the Union asserts that it proposed to move subparagraphs (b), (d), (e), (f), (g), (i) and (m) from Section 7 to Section 8 to make the Agreement conform with Company practice. This is supported insofar as the record shows numerous examples where violations of those subparagraphs were punished with warnings or suspensions rather than termination. (UX 27) But the reasons for wanting to move other subparagraphs tell us nothing about what was intended by *not* moving subparagraph 7(a). Furthermore, since no one had been accused of possession/use/sale of drugs in the mill before, no penalty had ever been imposed before—leaving the whole matter a big question mark. The language of Mill Rule 7 allowed the Company to *consider* violation of 7(a) cause for immediate discharge—but what would it do if the situation arose? Nobody knew, or could know, until it happened, and moving other subparagraphs (had the Company agreed) would not have provided the answer.

Fourth, the Company maintains (Co. Brief, p. 11):

> "Should the Arbitrator fail to apply the plain meaning of the contract and the parties' clear, consistent and longstanding past practice and bargaining history, the clearly stated policies which have been consistently maintained and expressed by the Company in support of this rule would be severely under-

mined to the detriment of the Company and *all* employees."

The "policy" to which the Company refers appears to be the safety policy, i.e. the policy that employees are expected to follow safe work practices and not act to endanger themselves or their fellow workers. There is no dispute that this is agreed policy; both parties have an obvious interest in protecting the safety of the workplace. There is considerable dispute, however, over the *implementation* of that policy, especially where penalties for violation of it have been involved. The Company asserts that the policy has been "consistently" maintained; the Union emphatically disagrees, pointing to the wide range of progressive discipline which has been imposed for Section 7 violations. I find that the record supports the Union on this point. Violations of 7(k) (leaving the mill without permission, certainly an "unsafe" move since it jeopardizes other employees who assume the employee is present) have been penalized with verbal warnings, written warnings, and two-day suspensions. The same applies to disorderly conduct. Sleeping on the job and smoking in unauthorized areas (two other obviously unsafe things to do) have been penalized only with written warnings—although they remain as violations of Section 7, punishable by immediate discharge. (UX 27) I see only one consistency in the Company's implementation of its safety policy—that of *amply* warning employees, even to the point of more than one last-chance EAP warning, before terminating them for violating Mill Rules.

The Company also argues that public policy as well as private, contractual policy, should be upheld by the Arbitrator, and it cites certain court decisions reversing arbitral reinstatement awards on grounds that reinstating a driver who admitted to driving while intoxicated, for example, would violate public policy against drunk driving. I make several responses: First, reversal is a pos-

sibility every adjudicator must live with, and fear of it should never influence the decision. Second, it is an arbitrator's responsibility to interpret and enforce the parties' Collective Bargaining Agreement, not to interpret and enforce public policies enshrined in external law. Third, the four grievances here involve different individuals and different circumstances. They cannot be lumped together or treated as equivalent to violating state laws on drugs. Some of the grievants may be prosecuted, in which eventuality I leave to the court questions involving state drug laws and public policy. It should be noted, however, that the question before me involves violation only of Mill Rule *7(a)*. Should any grievant be sentenced and incarcerated—and subsequently discharged under Mill Rule 7(m)—the opinion and award in the present arbitration case will have no bearing on those discharge actions.

Quantum of Proof: Preponderance, Clear & Convincing, or Beyond a Reasonable Doubt?

The Company argues first that this question is moot because the grievants effectively admitted their guilt. Unfortunately, it is not that simple. Grievant Buhelt made no such admission from the grave. Grievant Denis made no such admission. She maintained that she never "possessed" or "sold" marijuana; she merely told agent Berry where he could find some. Grievant Willoughby admitted only to possession, not to "sale" with which she was also initially charged. Moreover, all three grievants differed with Berry's account in a myriad of minor ways, and this requires a myriad of credibility resolutions as to which account the Arbitrator believes.

So the question must be grappled with: what *is* the proper standard of proof here? As the Company notes in its Addendum, this is a question which has been debated by arbitrators for many years. The Company would have me side with those who have concluded flatly

that the "beyond a reasonable doubt" standard is a concept from criminal law which has no place in labor arbitration. While I appreciate the difference between the powers of the state and those of a private employer, I find this line of reasoning disturbingly *a priori* and overly rigid. It is also misleading. The real question is not whether a formulaic phrase used in criminal law should be "borrowed" by arbitrators. It is whether arbitrators should require different standards of proof in different kinds of cases and, if so, what the standard should be here. The answer to the first is easy; common sense says that the more consequential the case, the more proof should be required. If a person is going to be executed upon conviction, no fairminded jury member will expect to sleep at night unless he is persuaded "beyond all reasonable doubt" that the accused is guilty. It has long been said that discharge is "the capital punishment of the workplace." Consequently, arbitrators have always been exceptionally concerned that they get to the truth of the matter and not "condemn" an innocent employee. This concern is all the greater where the alleged misconduct is not only violative of the Agreement, but is also potentially criminal or carries with it significant social stigma as is the case with drug dealing. (See "Standards of Proof and Investigative Evidence" in *Alcohol and Drugs Issues in the Workplace*, Denenberg, BNA, 1983.) It is one thing to uphold a discharge for excessive abstenteeism or poor workmanship. Future employers may assume the individual has matured, or they may be willing for other reasons to hire him. Upholding a discharge for *drug* activity is another matter altogether. Most employers are too busy to read a lengthy arbitration award or to make allowances for "minor" drug violations. They simply hear the word "drug" and pass over the applicant in favor of one with an apparently clean record. This "kiss-of-death" effect of a drug-related discharge is what leads arbitrators to want the strongest proof possible before they will deny the grievance.

The other side of the coin also must be taken into consideration, however—that of protecting society (i.e. fellow employees) and the safety of the workplace. This is the eternal balancing of individual versus societal rights which is the essence of all adjudication. Here is where arbitrators should "take their cue" first from the parties themselves before turning to external legal principles or to their personal philosophies. Even if the contract does not explicitly address the standard of proof question, an insightful examination of the entire Agreement, past practice, negotiation history and nature of the industry will reveal the parties' preference in weighing individual against societal interests. Based on the voluminous record in this case, I conclude that *these* parties have long placed the greater emphasis on individual rights. It is evident in certain provisions of the Agreement, for example, in the last sentence of the Grievance and Arbitration clause prohibiting an arbitrator from taking into consideration in discipline cases prior warnings more than one year old (Article 12, Section 6). What this means is that if an employee has not jeopardized his fellow workers by "sleeping on the job" or similar Mill Rule behavior, for more than a year, he will be given "the benefit of the doubt" in spite of the fact that he may do it again. This contractual principle of giving the benefit of the doubt to the individual has been put into practice *repeatedly* over the years, the record shows, as numerous employees have endangered themselves or co-workers with various Mill Rule 7 violations and have not been discharged. (Since the true purpose of progressive discipline is rehabilitative rather than punitive, this practice has been very successful as most employees appear to have heeded their warnings.)

There is another section of the Agreement which reveals the parties' concern for the individual employee. It is the No Strike-No Lockout clause (Article 13) which provides, in part, that the question "of whether an employee in fact was a participant [in a strike or work

stoppage] may be referred to the grievance and arbitration procedure." (JX 1) Granted, this language was intended for application in strike situations, not drug investigations, but it reveals the same concern—i.e. that an individual not be unfairly penalized for group behavior in which he did not actively participate and over which he may have had no control.

In sum, I conclude that these parties place their own premium on the individual in individual-versus-society situations of this sort, and I am bound to do the same. For this reason, the "beyond a reasonable doubt" standard will be applied.

The Defense: "Entrapment" or "Provocation?"

The Company argues that the defense of "entrapment" is not available in this case. Should the Arbitrator find that it is, however, the Company maintains that the Union must show both that the grievants were "induced" and that they were not "predisposed" to sell drugs in the mill. The Union responds that it has proved entrapment, but it should not be held to such a high standard of proof; instead it should be held only to proving that the grievants were "provoked."

With respect to the availability of the defense on the merits, I arrive at two conclusions: 1) The entrapment defense is available here because it is grounded in the same concern for fairness as is the "proper cause for discharge" clause in the Agreement. 2) It matters little whether the defense is characterized as "entrapment" or "provocation" because both theories require the Arbitrator to examine the evidence on "predisposition." This was done implicitly or explicitly in all of the provocation awards cited by the Union inasmuch as each arbitrator determined whether the grievant was willingly involved in the fight (or whatever) in spite of his having been provoked to some degree. For example, in *General Tire and Rubber Co.* (69 L.A. 1084, 1977), Arbitrator Nicolas

decided that the grievant was not predisposed to engage in fisticuffs with his supervisor because the evidence demonstrated that he was not the aggressor, that he acted largely in self-defense, and that he showed self-restraint under all the circumstances.

If it matters little whether "entrapment" or "provocation" theory is used in determining the merits, it does matter with respect to the remedy. As a general rule, when individuals are found to have been "entrapped," they are acquitted as "not guilty." In provocation cases, on the other hand, arbitrators have nevertheless determined that grievants were culpable to some extent for their misconduct, and some penalty short of discharge has been assessed. For these reasons, I will apply the term "provoked" rather than "entrapped."

Now, deciding that "predisposition" must be determined does not answer another question: Who has the burden of proving it? Must the Union prove that the grievants were not predisposed, or must the Company prove that they were? I conclude that, if the Union demonstrates that the grievants were "induced" or "provoked," the burden then shifts to the Company to demonstrate that the grievants were "predisposed" or "willing"—and it must do so with *evidence*, not conjecture based on psychological theories of human behavior.

Since so much time and effort was spent exploring psychological experimentation and theory at the hearing, however, I feel that I should respond. First, I agree with the Company that our legal system is based on a presumption of free will unless strong evidence to the contrary is presented. But I approach the evidence with an open mind—something I did not sense in Dr. Judson Smith's testimony, especially when he opined that people often have "a need" to be abused. I also remain wholly unimpressed with his testimony that male employees identify with teams and work for the corporate goal while female employees tend to identify with "diads" or "triads" and

work principally for the money. I am skeptical of all research purporting to show gender differences in human behavior. I suspect the tendencies Dr. Smith discussed vary more by individual personality than by gender, and most people of both sexes need both large and small groups with which to identify and both financial and common goals as incentives.

Now, having said that about Dr. Smith's testimony, let me say this about the point of view presented by the Union psychologist, Dr. Bishop. Both Dr. Bishop and Union counsel in his post-hearing brief argue eloquently for an understanding of the extraordinary pressures which a "pioneer" suffers while he or she is the only person of a kind attempting to lead the way for others. I accept that those pressures are enormous. Company psychologist Dr. Smith himself described his once being the only white male in an otherwise predominantly black workplace as "an unforgettable experience" which left him with abiding sympathy for all minorities. There is a point, however, where sympathetic understanding can shade into patronization—a fine line adjudicators should not cross. It must be remembered that the three women grievants held their particular jobs voluntarily. They did not claim that the Company discriminated against them or that they were entitled to some special treatment. They described their relationship with male co-workers as comfortable for the most part and accepted most of the kidding they received as normal workplace banter. I also note that while the grievants were young (in their 20's), they were all adults when agent Berry approached them (not children under twelve, as Lt. Snow said undercover agents are expected to avoid), and all three had control of their own minds (none was "obviously insane," none was apparently affected by substance abuse, and even grievant Willoughby believed she was improved enough emotionally to make her own decisions without EAP help). All of these considerations must be weighed against

the admittedly severe pressures each was under as the only woman in her respective work area.

Questions of Remedy

Having dispatched with questions of interpretation and proof, we come now to the question of remedy. First, do I have the authority to reduce the penalty if some culpability on the grievants' part is found? The Company argues that I do not because the contract clearly calls for discharge. That contention was laid to rest at the beginning of the opinion; the Agreement does not "clearly" require immediate discharge, and past practice only heightens the ambiguity about what will happen to the employee who violates Mill Rule 7. Nor is there any express restriction in the Agreement limiting the Arbitrator's remedy authority. Under these conditions, it is well established that where an arbitrator is adjudicating a "proper cause" case, and he or she finds that the discharge penalty was improper because it was arbitrary, capricious, in bad faith, discriminatory, excessively or disparately harsh, or just plain unfair—he or she has the authority to fashion a lesser penalty or direct make-whole remedy as the facts of the case require.

Now the question arises as to how a lesser penalty should be determined where discharge is found improper but no similar cases exist with which to compare. I speak here of the fact that there are the first *drug*-related discharges to occur. Does this mean I am free to impose my own "brand of justice" based on personal disapproval of drugs? Obviously not. As in all things previous, I must turn to the parties for guidance. It is not the Arbitrator's role to grant clemency; neither is it my role to impose a much harsher penalty than has been imposed for similar behavior in the past.

The most similar behavior is alcohol possession, use or sale. The Company would have me distinguish between alcohol and drugs here. I recognize that external, state

law makes such a distinction—*but the Agreement does not.* The Agreement lumps "intoxicants, marijuana, narcotics or other drugs" into one rule (7(a)). It then lumps that subsection into a long list of other forms of serious misconduct—some endangering to others and some potentially criminal in nature—for which immediate discharge may result. Nor is there any evidence that the Company has consistently distinguished between criminal and non-criminal misconduct in the progressive discipline it has meted out. Neither theft nor incarceration have always met with discharge.

It is not implied that discipline must be meted out according to a mathematically precise formula; every case *is* different, after all. But the Arbitrator should determine the parameters of "the parties' ball park" and stay roughly within them. If previous suspensions have been in days, for example an arbitrator should not impose a suspension in months, and so forth. Here I note that the longest suspension on record appears to be the six months imposed on two employees for embezzlement. The one other employee who violated Mill Rule 7(a) (for using alcohol in the mill) was given a 60-day suspension. (UX 23) In the past ten years, the record shows there have been at least nine other suspensions for Mill Rule 7 violations, ranging from one day to seven weeks. (UX 27)

Finally, the role of the EAP program in discipline must be addressed. I agree with the Company that the grievants in this case were not entitled to a "last-chance" EAP agreement in lieu of disciplinary action. The EAP exists to help employees whose personal problems, alcoholism or drug *abuse* are affecting their work performance; it does not exist to provide alternative punishment for offenses such as drug *dealing* where there is no evidence that the offender's behavior was caused by substance abuse.

In sum, drug activity in the workplace must be viewed as very serious misconduct, but I can find no contractual

justification for penalizing it with workplace execution while employees who have engaged in other forms of serious misconduct are merely fined with suspensions or are slapped on the wrist with warnings. Under the proper cause provision, the Company has the right to discipline employees who violate Mill Rules, including the right to discharge where necessary, but the discipline must be reasonably even-handed to be fair or "proper." This is precisely the issue before the Arbitrator: Did the Company have proper cause to discharge these grievants and, if not what shall be the remedy? I turn now to resolving these questions in each grievant's case.

Kimberly Denis

Grievant Denis admits that she took money from agent Berry for the purpose of getting him some marijuana from Miller Hunt, and that she told Berry where the marijuana was when he asked about it. Beyond this, however, the testimony of Denis and Berry varies at numerous crucial points, and the Arbitrator has the unenviable task of determining whose testimony is the more credible. For clarity and conciseness, I lay out that determination and the reasoning behind it in the following chart form: (*Italics* indicates the testimony credited. In some instances, I credit both.)

Kimberly Denis	*Timothy Berry*	*Reason*
one gram for $10	(*two grams for $20*)	State Analysis Report shows two grams tested.
did not say "supplier"	that her supplier only had a dime bag left	"Supplier" is a term of art more likely used by policeman Berry than by grievant. Also report did not use quotes.
he offered $20, then replaced with $10	(*she suggested $20*) (*she offered to keep the $20*	By her own testimony, the grievant was trying to keep

I kept trying to give the $20 back He named Miller Hunt	(*I didn't know him yet*) (*Report—guy in coater cutters*)	on Berry's "good side." Berry had not been in the mill very long and probably had not met Hunt.
I just pointed	she said "I put the pot in the core of that roll of paper."	The plant is noisy; he could have misheard or assumed.
He asked me out; I said no	*She asked me out, I said no*	They were on friendly terms; both could have suggested a drink after work without meaning much by it.
He asked me 4-5 times to smoke mj with him	*Never*	Both smoked cigarettes; there is ample room for misunderstanding here too.
I never smoked in the mill; it's a good way to lose your fingers	Her eyes were red; her skin pale, she said she had been doing it	Other witnesses testified to fumes in her area which made their eyes red; she is naturally fairskinned; Berry is not qualified to diagnose; she could have been kidding.

Thus, I find that grievant Denis agreed to try to get Mr. Berry $20 worth of marijuana, and, when he said he couldn't wait until Saturday, she went to Miller Hunt on her own to ask if he (Hunt) would sell some to Berry. Later she pointed Berry in the direction of the marijuana.

According to police witnesses, this was "trafficking" in the eyes of the law. But that is not the question before the Arbitrator. Here the question is, was what Ms. Denis did within the meaning of the Agreement's prohibition in Mill Rule 7(a) against "possession/use or sale" of drugs

in the mill? I conclude that it was. It is abundantly evident that neither the Company nor the Union condones *anything* having to do with drugs in the mill. I am persuaded that grievant Denis knew this. She admitted to being aware of Mill Rule 7(a). Her contention that she didn't think she was doing anything wrong at the time because going to Hunt on Berry's behalf wasn't really "possessing" or "selling" drugs is self-serving rationalization. The same applies to her comment that what she did was "nothing compared to what those other guys were doing" (referring to employees, not grievants in this case, who were also discharged for drug dealing in the mill). Two wrongs do not make a right, and arguing that others are worse does nothing to justify one's own misconduct. I note, moreover, that the Agreement makes no distinction between "marijuana, narcotics or other drugs." All are equally prohibited in the mill in Mill Rule 7(a). Any feeling that "it was only marijuana" may be supportable under state law which classifies marijuana differently from other drugs, but it is not supportable under the Agreement which treats them the same. In sum, I am persuaded beyond a reasonable doubt that grievant Denis violated Mill Rule 7(a) by her behavior acting as a go-between for Berry on November 3, 1983.

Now we turn to the question of whether she was improperly "induced." I conclude that she was not. Agent Berry admitted to asking her for marijuana "often." Pressed for a specific estimate, he suggested two or three times; Ms. Denis estimated that he asked her three to five times before she took $20.00 from him. Let us settle on the point of agreement: three times. I cannot find this excessive under all the circumstances. Granted, Ms. Denis was in a vulnerable position. She was a woman half Berry's age working alone in an overwhelmingly male environment. She was in no position to risk alienating him, and she could not avoid him. But she had not exhausted her alternatives when she went to Hunt on Berry's behalf. She could have said she didn't

know who else he might get it from in the mill that day, for example. Berry would hardly be offended if she simply did not know something—unless, of course, she had actively led him to believe she did. In short, I cannot find that she was "provoked" beyond the limit where a normal person could be expected to behave differently.

Finding no improper inducement, the question of predisposition need not be addressed. But the question remains whether or not discharge was the appropriate penalty in this case. It was concluded above that under Mill Rule 7 discharge is not mandatory; it is discretionary. In retaining that discretion in conjunction with the "proper cause" limitation, the Company also retained an obligation to be fair, to be even-handed in disciplining employees for violations of Mill Rules. I cannot conclude that the fairness obligation has been met where the Company has "walked the extra mile" with so many violators of Mill Rule 7 in the past in spite of the seriousness of their violations. Insofar as this was the Company's first experience with an undercover drug investigation, its "off-with-their-heads" reaction to Berry's reports can be attributed to understandable nervousness rather than punitiveness—but it cannot be sustained as a matter of equity. The proper penalty is suspension.

The question now remaining is how long that suspension should be, i.e. how much should be subtracted from back pay. This should be determined not on the arbitrary basis of how long it took to get from discharge to reinstatement (more than seventeen months in this case), but on the basis of equity as understood between the parties. Here I conclude that the parties have always expected that possession, use or sale or drugs in the mill would be penalized severely, if not necessarily with discharge. Thus a suspension of many months is in order. Taking into account all the circumstances in this complex case, I conclude that the proper penalty is a seven-month suspension. Admittedly, this is longer than the

six-month suspension imposed on employees said to have embezzled up to $25,000, but drug-dealing constitutes a danger to all employees' safety whereas embezzlement does not.

Debra Graham

Grievant Graham admitted that she sold several grams of marijuana to agent Berry in the mill on January 12, 1984. I am thus persuaded beyond reasonable doubt that she did violate Mill Rule 7(a).

I turn now to the question of provocation: First, was she "induced?" I find that she was. Agent Berry estimated that he asked her about drugs "perhaps six or seven times." Accepting this as more likely than Graham's varying estimates of up to thirty times, I nevertheless find it excessive. It must be remembered that Berry was a co-worker; he was not someone Graham could avoid. She had to put up with his behavior or report him to management. It is easy to say in retrospect that she should have reported him, but hindsight is always twenty-twenty, and all he was doing was *asking* her for something. If she considered reporting him, she probably was justified in concluding it would accomplish little other than making an enemy of someone she would continue to have to work with because all the Company would be likely to do would be to warn Berry to stop. In short, I find that Ms. Graham was caught in a damned-if-you-do-damned-if-you-don't situation in light of which Berry's repeated requests must be viewed as considerable pressure.

Second, was she "predisposed?" The Company maintains that she was, and it cites Berry's report that *she* approached *him* as the strongest evidence. Inasmuch as Ms. Graham denies approaching Berry, a credibility resolution must be made. I credit Berry. He wrote his report shortly after the transaction occurred while his memory was fresh. There is no reason why he should

state that Ms. Graham approached him if that were not the case. He did not report that the other grievants in this matter approached him. Graham acknowledged having Ronald Harmon with her at the time, but no reason was offered for Harmon's failure to corroborate her testimony. Ms. Graham has self-interest involved in claiming that Berry approached her. Her testimony also betrayed a ready familiarity with the "going price" of marijuana by the ounce and a flat unwillingness to sell it for less than she paid for it—in spite of her professed sense of obligation to Berry for his helpfulness. In sum, I find the evidence of Ms. Graham's predisposition to sell marijuana in the mill convincing. She was not provoked into doing something she would not have done otherwise.

The question now remains whether discharge was the proper penalty. It has been established that Ms. Graham did violate Mill Rule 7(a) and that she did so knowingly that it was cause for discharge. It has also been determined that she was not entitled to a last-chance EAP agreement. But, as a matter of fairness and equity, should she have been warned or suspended rather than discharged? As stated earlier, Mill Rule 7(a) is simply one of a long list of misconduct for which an employee may be discharged. There is no indication in the Agreement that 7(a) is regarded as more serious than, for example 7(h) (dishonesty, which presumably includes theft) or 7(k) (leaving the mill without permission). Violation of any one of the Mill Rule 7 provisions can be a serious matter; many put fellow employees at risk as well as the violator himself. *Yet the vast majority of employees who have violated Mill Rule 7 in the past have suffered suspension at most.* In light of this fact, I conclude that the discharge was unequitably harsh. The proper penalty is suspension.

How long a suspension? I conclude nine months is the appropriate penalty "to fit the crime." I take into account the fact that Ms. Graham had only a few months' experience in the mill when she sold marijuana

there—not enough time to build a good work record in her favor. Also, there is evidence in the record that she approached Berry with an offer to sell, and her demeanor as a witness betrayed a somewhat cavalier attitude towards marijuana in the mill. By assigning her the heaviest suspension in this case, the Arbitrator hopes to impress upon her the gravity of her misconduct.

Linda Willoughby

While grievant Willoughby admitted to giving Berry a small amount of marijuana at the mill on January 30, 1984, her testimony on the specifics of the circumstances varied enough from Berry's account to require close examination and credibility determinations by the Arbitrator. The following chart indicates in italics whose account is credited and why.

Linda Willoughby	*Timothy Berry*	*Reason*
he approached me 5 times	I approached her 3 times	4 times is found. She had motiev to exaggerate; he could easily forget one unsuccessful approach.
5th time I took all of it from an envelope in my pocketbook and gave it to him.	*3rd time she took a bag from pants pocket, gave me "a very small amount"*	Berry's account is very specific; Willoughby more general. Berry has a presumption in his favor; Willoughby had incentive to minimize her involvement.
there was no remaining marijuana to sell or to put back in pocket	*She refused to sell any of the rest; she put it back in her pocket*	Same as above.
He had asked me to get him some 'weed" many times, as least once a week	I asked her perhaps two or three times	Berry admitted to being persistent where he got indication an employee might be willing. In addition to the three grievants, one co-worker attested to Berry's *frequent* talk of marijana.

Combining the above credibility determinations with uncontradicted testimony, it is found that Linda Willoughby was asked to provide marijuana eight to twelve times in the eight to twelve week period she knew agent Berry. On January 30, 1984, Berry approached her in her work area (not his) four times, but she kept putting him off. The final interval of time which elapsed between his next-to-last and the final (successful) approach was twenty minutes (1900 hours-1920 hours, according to Berry's report CX 14). She pulled a bag with perhaps a quarter-ounce of marijuana in it from her pocket, gave three (3) grams of it to Berry, and refused money in return. Granted, no "sale" occurred and granted, only a very small amount of marijuana changed hands—the Arbitrator is nevertheless persuaded beyond reasonable doubt that grievant Willoughby *possessed* marijuana on mill property and in doing so violated Mill Rule 7(a).[6]

---

[6] With respect to the second piece of the grievant's behavior—her giving the marijuana to someone she believed to be a fellow employee—I conclude that the Company effectively dropped this "charge" against Ms. Williughby when it answered the Union at the third step as follows (JX 2d), emphasis added:

> "The union stated position has been that Linda simply gave the agent a 'joint', that she took no money, therefore, was not guilty of sale of marijuana, thus should not be discharged. The settlement desired by the union is full reinstatement with back pay.
>
> *The facts presented in this case are, that Linda Willoughby did possess marijuana on mill property, on 1/30/84. Possession of marijuana on mill property is clearly stated as cause for discharge in Appendix A, Section 7(a) of the Labor Agreement.* Grievance denied.

Since giving the marijuana to Berry no longer serves as a basis for the termination, the Arbitrator should not address it. (The same applies to the Company's attempt to show that Ms. Willoughby was violating her EAP agreement at the time of her dealing with Berry by failing to appear at her counseling sessions. Even if this were proved, it was not given as a reason for the discharge in the notice of termination, and the Company cannot bring it forward at this point. (JX 3d))

Now, was the "induced" or "provoked" into doing so? It must be stressed that the question here is whether she was provoked into bringing the marijuana into the mill—not whether she was provoked into giving it to agent Berry. Ms. Willoughby attested that she brought the marijuana to work that day intending to give it to Berry in hopes that he would then leave her alone, and that she had never before brought marijuana into the mill. I find this explanation confused and contradictory. If she did not want to give it to him, as she claims is the reason for her repeatedly telling him she was "busy," why would she have brought it into the mill especially for him in the first place? In addition, if he had never before brought marijuana to work, why would Kimberly Denis tell Berry that she (Willoughby) probably had some? I credit Ms. Willoughby's testimony that she did not *want* to give any to Berry and that she did not suggest he see her after work because she didn't want to see him socially—but I cannot credit her claim that she brought the marijuana with her that day only for the purpose of getting Berry to leave her alone. What I find far more likely in light of all the evidence is that she had the marijuana for her own use probably after work, and that she had some frequently enough for at least one other employee (Denis) to know about it. It was not Berry's frequent asking which provoked her to do this; it was her own custom, something she was "predisposed" to do.

Having concluded that Ms. Willoughby freely possessed marijuana in the mill knowing that it was against Mill Rules, the question now is what is the proper penalty? In considering this question, there is one thing I do *not* take into account: the relatively small amount of marijuana involved in her case. *Any* amount is prohibited under Mill Rule 7(a). I do take into account, however, the grievant's seniority, her good performance record, the difficult working conditions she had to contend with, and the fact that she resisted three of Berry's requests on January 30 depsite her concern that his repeated ap-

proaches would get her in trouble. I am persuaded that she possessed the marijuana for the sole purpose of smoking it herself after work. There is no evidence whatsoever that she used it in the mill and, since she sustained a serious hand injury at work once before and served on the mill safety committee, I credit her statement that she was well aware of the safety reasons for not smoking marijuana at work and never did it. I also take into consideration the fact that Ms. Willoughby was still under EAP treatment when the drug investigation was underway. Granted, agent Berry could not be expected to know that, but the Company knew. If the Company felt it owed an employee a second EAP opportunity where he was both possessing and using alcohol at work to the point of obvious intoxication, it owes at least as much to this employee caught only in possession. Ms. Willoughby's reinstatement, therefore, will include reinstatement to the EAP program.

In sum, balancing the seriousness of drug possession in the mill against the many mitigating factors in Ms. Willoughby's case, I conclude that the fair penalty is a four-month suspension.

Marshall Buhelt

The first question to resolve is whether it is proved beyond reasonable doubt that grievant Buhelt violated Mill Rule 7(a). I find that it is. Needless to say, Mr. Buhelt could not speak for himself at the arbitration hearing, but the evidence against him is overwhelming. Agent Berry was subjected to vigorous cross examination and belligerent interruption by Union counsel, yet his testimony was credible on most counts. I am not impressed by the Union's effort to impeach Berry's testimony with respect to how he "simulated" smoking marijuana with Mr. Buhelt, or by its effort to impeach with evidence that Berry admittedly had some sort of nervous breakdown *after* he completed the S.D. Warren undercover investigation.

Now, was Buhelt "induced" to sell marijuana in the mill by Berry's request? It is difficult to tell without knowing how many times Berry approached Buhelt before November 13, 1983 when the first transaction occurred. Asked for a specific estimate, agent Berry responded somewhat contradictorily that "every time I mentioned it, he sold me some" and "I talked to him about it often." Giving Buhelt the benefit of the doubt, I conclude that Berry asked numerous times, and Buhelt may have been induced.

He was, however, also "predisposed." Bill Carver attested that Buhelt had an evident substance abuse problem and rejected Union advice that he enroll in the EAP. Evidence more convincing on predisposition is found in Berry's reports. First, Buhelt sold Berry marijuana *twice.* It is rare that someone does something he is not predisposed to do more than once. Second, Buhelt offered to bring marijuana in from home when he did not have any with him at work. Third, Buhelt *offered* to take Berry with him to get some after work. Fourth, Buhelt *urged* Berry to smoke with him in spite of Berry's efforts to excuse himself. (CX 10, 11)

If Buhelt was not provoked into violating Mill Rule 7(a), are there other mitigating circumstances which should result in a reduction of the discharge penalty? The Union argues that he had a substance abuse problem and other employees similarly situated have been given last-change EAP agreements. The Company responds that no causal relationship between Buhelt's apparent drug abuse and his misconduct has been established. I agree with the Company. The record shows that numerous employees with abuse problems have been given last-chance agreements, even where their misconduct has been potentially endangering to other employees, but it appears that their misconduct has stemmed directly from their abuse. Incidents of refusal to obey rules, loud arguments with supervision, inability to stand up, and

the like can be assumed to happen because the employee is under the influence of something; he is "out of control." There is no evidence that Marshall Buhelt was under the influence of drugs when he twice sold marijuana to agent Berry. Berry did not report obvious signs of it, and he did make such observations about other employees, whether credited or not. In sum, I cannot conclude that equitable treatment required the Company to offer a last-chance EAP agreement to grievant Buhelt.

But what of the many suspensions in the record? In the other three grievances, the grievants' misconduct was found to be not such a quantum's leap more serious than that of many employees suspended that discharge was justified. Is grievant Buhelt's misconduct significantly different? I conclude that it is. *He is the only grievant who actively urged—indeed pressured—a fellow employee to use marijuana at work.* I credit agent Berry's testimony that he "tried to get out of it." He knew the dangers smoking would put him in. If he and Buhelt were caught by supervision, his "cover" might be blown. If Buhelt detected his "simulation," the result could be the same. In short, accepting Buhelt's invitation jeopardized the entire investigation Berry had only just begun. I deduce that grievant Buhelt must have been insistent indeed to get Berry to cooperate, and no employer should tolerate this kind of behavior no matter how patient it has been with other kinds of misconduct. Employees may be forgiven for foolishly jeopardizing their own safety and that of their co-workers by possessing or selling marijuana at work, but *pressuring* a coworker into *using* it there cannot be condoned.

For all the aforestated reasons, this grievance is denied.

Summary

As this case has involved four discharges for five separate violations of the Agreement, it has necessarily

entailed a lengthy hearing, lengthy post-hearing briefs—and a lengthy decision by the Arbitrator. Its complexity presented many challenges to all parties concerned, not the least of which was separating the trees from the forest while still finding the correct path out of it! It was mere happenstance that the grievants were part of a large group terminated at the same time for similar, *but not identical*, behavior. The fact that they were terminated as a group should not be allowed to operate against their rights to be heard as individuals and to each have his or her case decided on its own merits. "The halo effect" where one person looks good (or bad) depending on the case standing next to him is something all adjudicators must resist. I have fought that good fight to the best of my ability. Marshall Buhelt's discharge is sustained because he pressured a co-worker into smoking marijuana with him in the mill. Reinstating him (if it were possible) would effectively put back into the mill an employee who would pose an active threat to his fellow workers. The remaining discharges are overturned on ground that they were excessively harsh in light of past disciplinary practice for similarly serious Mill Rule 7 violations. Heavy suspensions are imposed, however, to impress upon the grievants the seriousness of their misconduct. Bringing marijuana into the mill and passing it on to co-workers cannot be viewed as acceptable social behavior. No one knows how a given drug will affect another human being. It was a friend at a party who handed Karen Ann Quinlan the pill which finally killed her. These grievants took the chance that they might be responsible for serious injury when they "helped" Timothy Berry get the marijuana he was after. Loyalty among workers probably precluded their reporting him to management, but "true friends do not let friends drive drunk"—*and they do not help friends at work find drugs.* I feel quite certain that grievants Graham, Denis and Willoughby fully realize this now and will return to work with the determination to be

productive employees which motivated them in the first place.

The grievances of Kimberly, Denis, Debra Graham and Linda Willoughby are sustained. The Company is directed to reinstate each of them with full back pay, seniority and benefits, minus interim earnings, if any, and minus pay for nine months in the case of Ms. Graham, seven months in the case of Ms. Denis, and four months in the case of Ms. Willoughby. The latter deductions shall stand as unpaid suspensions on their records. The Arbitrator shall retain jurisdiction with respect to the remedy for a period of three months from the date of the Award.

The grievance of Marshall Buhelt is denied.

/s/ Suzanne Butler Gwiazda
SUZANNE BUTLER GWIAZDA
Arbitrator

DATED: September 19, 1985

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-60

UNITED PAPERWORKER'S INTERNATIONAL UNION, AFL-CIO, LOCAL 1069

Applicant,

v.

S.D. WARREN COMPANY, ETC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 11, 1987.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 22nd day of July, 1987.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-60

UNITED PAPERWORKER'S INTERNATIONAL UNION, AFL-CIO, LOCAL 1069

Applicant,

v.

S.D. WARREN COMPANY, ETC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including October 9, 1987.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 24th day of August, 1987.

Supreme Court, U.S.
FILED
NOV 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-583

In The

Supreme Court of the United States

October Term, 1987

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,

Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a federal court have the power to vacate an arbitral award which disregards unambiguous collective bargaining agreement language and substitutes therefor the arbitrator's own brand of industrial justice?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
A. There Is No Conflict Among Circuits	4
B. There Is No Important Question Of Federal Law	7
C. The Pending *Misco* Case Is Not A Reason To Grant Certiorari In This Case	11
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643 (1986) 8

Amoco Oil Co. v. Oil, Chemical & Atomic Workers Int'l Union, 548 F.2d 1288 (7th Cir.), *cert. denied*, 431 U.S. 905 (1977) 10

Arco Polymers, Inc. v. Local 8-74, 671 F.2d 752 (3d Cir.), *cert. denied*, 459 U.S. 828 (1982) 10

Bechtel Constr., Inc. v. Laborers' Int'l Union, 812 F.2d 750 (1st Cir. 1987) 9

Detroit Coil Co. v. Int'l Ass'n of Mach. & Aerosp. Workers, 594 F.2d 575 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979) 7, 10

Ethyl Corp. v. United Steelworkers, 768 F.2d 180 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1184 (1986) 6, 10

F. W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local 781, 629 F.2d 1204 (7th Cir. 1980), *cert. denied*, 451 U.S. 937 (1981) 10

Fabricut, Inc. v. Tulsa General Drivers, Warehousemen & Helpers, Local 523, 597 F.2d 227 (10th Cir. 1979) 9

H. K. Porter Co. v. United Saw, File & Steel Products Workers, 333 F.2d 596 (3d Cir. 1964) 6

Industrial Mutual Ass'n v. Amalgamated Workers, Local 383, 725 F.2d 406 (6th Cir. 1984) 10

Int'l Bhd. of Firemen & Oilers, Local 261 v. Great Northern Paper Co., 765 F.2d 295 (1st Cir. 1985) 9

Int'l Bhd. of Firemen & Oilers, Local 935-B v. Nestle Co., 630 F.2d 474 (6th Cir. 1980) 4, 5

TABLE OF AUTHORITIES—Continued

Page

Int'l Union of Operating Eng'rs, Local 670 v. Kerr-McGee Refining Corp., 618 F.2d 657 (10th Cir. 1980) 6, 7

Kane Gas Light & Heating Co. v. Int'l Bhd. of Firemen & Oilers, Local 112, 687 F.2d 673 (3d Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983) 5

Local 342, U.A.W. v. T.R.W., Inc., 402 F.2d 727 (6th Cir. 1968), *cert. denied*, 395 U.S. 910 (1969) 10

Manhattan Coffee Co. v. Int'l Bhd. of Teamsters, Local 688, 743 F.2d 621 (8th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985) 10

Misco, Inc. v. United Paperworkers Int'l Union, 768 F.2d 739 (5th Cir. 1985), *cert. granted*, 107 S. Ct. 871 (1987) (No. 86-651) 11, 12

Mistletoe Express Service v. Motor Expressmen's Union, 566 F.2d 692 (10th Cir. 1977) 4, 6, 10

Morgan Services, Inc. v. Local 323, Chicago & Central States Joint Board, 724 F.2d 1217 (6th Cir. 1984) 4, 6

Posadas de Puerto Rico Assoc., Inc. v. Asociacion de Empleados de Casino de Puerto Rico, 821 F.2d 60 (1st Cir. 1987) 9

Sears, Roebuck & Co. v. Teamsters, Local 243, 683 F.2d 154 (6th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983) 10

St. Louis Theatrical Co. v. St. Louis Theatrical Bhd., Local 6, 715 F.2d 405 (8th Cir. 1983) 7

Storer Broadcasting Co. v. Am. Fed'n of Television & Radio Artists, 600 F.2d 45 (6th Cir. 1979), *cert. denied*, 454 U.S. 1099 (1981) 7, 10

Super Tire Eng. Co. v. Teamsters, Local 676, 721 F.2d 121 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984) 10

TABLE OF AUTHORITIES—Continued

Page

Teamsters, Local 657 v. Stanley Structures, Inc., 735 F.2d 903 (5th Cir. 1984) 7

Teamsters, Local 863 v. Jersey Coast Egg Producers, 773 F.2d 530 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1468 (1986) 10

Textile Workers Union, Local 1386 v. American Thread Co., 291 F.2d 894 (4th Cir. 1961) 5

Trailways Lines, Inc. v. Trailways, Inc. Joint Council, 807 F.2d 1416 (8th Cir. 1986), *reh. denied*, 817 F.2d 1333 (8th Cir. 1987) 6

Truck Drivers & Helpers Union, Local 784 v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964) 7

Trustees of Boston Univ. v. Boston Univ. Chapter, Am. Ass'n of Univ. Professors, 746 F.2d 924 (1st Cir. 1984) 9

United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960) 8, 9

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 8, 9, 11

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Young Radiator Co. v. Int'l Union, U.A.W., 734 F.2d 321 (7th Cir. 1984) 6

RULE

United States Supreme Court Rule 28.1 1

No. 87-583

In The

Supreme Court of the United States

October Term, 1987

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,

Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,[1]

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

[1]In satisfaction of the requirements of United States Supreme Court Rule 28.1, Scott Paper Company has the following subsidiaries and affiliates (except wholly-owned subsidiaries): Scott Iberica, S.A.; Taiwan Scott Paper Corporation; Cellulosa Jujuy, S.A.; Compania Industrial de San Cristobal, S.A.; COPA-Companhia de Papeis; Sanyo Scott Company Limited; Scott Paper Company de Costa Rica, S.A.; Scott Paper Limited; Scott Trading Limited; Ssangyong Paper Co., Ltd.; Thai-Scott Paper Company; Brunswick Pulp Land Company (partnership); Canso Chemicals Limited; Mountain Tree Farm Company.

STATEMENT OF THE CASE

This case hinges upon the construction of a certain collective bargaining agreement between the parties governing the production employees at Respondent's (hereinafter sometimes referred to as the "Company") paper mill in Westbrook, Maine. After three mill employees were discharged for violation of a specific contract rule, Rule 7(A), prohibiting possession, use or sale of illegal drugs on the mill premises, Petitioner (hereinafter sometimes referred to as the "Union") filed grievances on behalf of the discharged employees. The grievances ultimately were submitted to arbitration.[2]

The bargaining agreement provides that the Company has "the sole right to . . . discharge . . . for proper cause." Petitioner's Appendix (hereinafter "App.") 43a. It further provides that violation of Rule 7(A) "is considered cause for discharge." The arbitrator found that the three grievants, in fact, violated Rule 7(A) and acknowledged that such violations were dischargeable offenses. She nevertheless ordered the employees reinstated because she found Rule 7(A) ambiguous in that its heading, "Causes for Discharge," contains no verb and in that it fails to state that violations unequivocally "will be" cause for

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[2]In fact, twelve employees were simultaneously discharged for violation of Rule 7(A). The grievances involved herein, together with the grievance of Marshall Buhelt, were consolidated with a fifth grievance filed on behalf of Roland Villacci and assigned to Arbitrator Suzanne Gwiazda. Prior to hearing, the Union voluntarily dismissed the Villacci grievance. Arbitrator Gwiazda upheld the discharge of Mr. Buhelt. Five other grievances were consolidated and assigned to Arbitrator Theodore Role, whose award is the subject of another related and pending proceeding. The Union never filed grievances on behalf of the remaining two discharged employees.

discharge. App. 66a-67a. The arbitrator also observed that, under the contract, the Company "chose to retain discretion over such decisions" regarding discipline for violation of Rule 7(A). App. 67a.

The arbitrator then reasoned that the Company's retention of discretion over discipline somehow "allowed a third party neutral [i.e., the arbitrator] the same discretion when reviewing the propriety of those [disciplinary] decisions." App. 67a. *See also* App. 87a. In other words, because the Company made certain at the bargaining table to retain for itself the "sole right" to decide to discharge for proper cause, it also subjected such discretionary decisions to arbitral review.

The arbitrator, therefore, reviewed *de novo* the "fairness" of the Rule 7(A) discharge decisions by weighing various "mitigating circumstances."[3] Despite her finding that there was no past practice with respect to possession, use or sale of drugs on mill premises, App. 74a, she also examined the relative severity of discipline imposed for other unrelated employee misconduct. *See, e.g.*, App. 68a-69a. She found that although the grievants' "drug activity in the workplace must be viewed as very serious misconduct," App. 84a, "as a matter of equity," discharge was an excessively harsh punishment for such misconduct. *See* App. 84a, 87a, 89a, 92a.

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[3]For example, in determining the "fair" penalty for Linda Willoughby, the arbitrator specifically took into account her seniority, work record, difficult working conditions, initial resistance to the undercover agent and possession of marijuana for post-work enjoyment. App. 92a. "Balancing the seriousness of drug possession against the many mitigating factors in Ms. Willoughby's case," the arbitrator "conclude[d] that the fair penalty is a four-month suspension." App. 93a.

The United States District Court for the District of Maine confirmed the arbitrator's award reinstating the discharged employees. The United States Court of Appeals for the First Circuit reversed the district court decision, holding that the arbitrator exceeded her authority by substituting her extra-contractual view of fairness and equity for the Company's collectively bargained right to discharge employees who use, possess or sell drugs at work. App. 14a-15a. The First Circuit also held that the arbitrator's award violated the dominant and well-defined public policy against drugs in the workplace. App. 18a.

The question for this Court is whether this case involving the construction of the parties' contract presents an issue with respect to which there is a direct and important conflict of the circuit courts of appeals which requires Supreme Court resolution, presents such an important constitutional or statutory question as to warrant review or, for any other reason, demands this Court's attention.

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REASONS FOR DENYING THE WRIT

A. THERE IS NO CONFLICT AMONG CIRCUITS.

The First Circuit decision is in accord with, and expressly relied on, decisions in the Sixth and Tenth Circuits. *See Morgan Services, Inc. v. Local 323, Chicago & Central States Joint Board,* 724 F.2d 1217 (6th Cir. 1984); *Int'l Bhd. of Firemen & Oilers, Local 935-B v. Nestle Co.,* 630 F.2d 474 (6th Cir. 1980); *Mistletoe Express Service v. Motor Expressmen's Union,* 566 F.2d 692 (10th Cir. 1977). The First Circuit also relied on the Fourth Circuit decision

in *Textile Workers Union, Local 1386 v. American Thread Co.*, 291 F.2d 894 (4th Cir. 1961). App. 13a-14a.

Petitioner maintains, however, that the decisions of the Third, Fifth, Seventh and Eighth Circuits stand "in stark contrast" to, and are in direct conflict with, the decisions of the First, Sixth, Tenth and, presumably, Fourth Circuits. This simply is not the case. *Not one* of the Third, Fifth, Seventh and Eighth Circuit decisions cited by Petitioner contains any statement rejecting, or even mildly criticizing, the Sixth and Tenth Circuit decisions with which they allegedly conflict; nor do they acknowledge the existence of the conflict suggested by the Union.

Indeed, the Third Circuit, far from rejecting the Sixth and Tenth Circuits' decisions, has expressly approved them. In *Kane Gas Light & Heating Co. v. Int'l Bhd. of Firemen & Oilers, Local 112*, 687 F.2d 673 (3d Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983) (upholding award reinstating employee discharged for insubordination on ground that arbitrator found that discharged employee was not, in fact, insubordinate), the Third Circuit distinguished and expressly approved the Sixth Circuit's decision in *Int'l Bhd. of Firemen & Oilers, Local 935-B v. Nestle Co.*, 630 F.2d 474:

> *Nestle*, however, merely stands for the proposition—*with which we fully agree*—that an arbitrator's decision should be vacated when the arbitrator finds facts that constitute grounds for discharge under the collective bargaining agreement, but, in disregard of those facts and the terms of the agreement, refuses to uphold the discharge.

687 F.2d at 680 (emphasis supplied). The court also specifically cited with approval the Tenth Circuit's decision

in *Int'l Union of Operating Eng'rs, Local 670 v. Kerr-McGee Refining Corp.*, 618 F.2d 657 (10th Cir. 1980) (following *Mistletoe*, court vacated award wherein arbitrator ignored provisions in agreement making the giving of false statements to obtain sick leave grounds for discharge). *Id.; see also H. K. Porter Co. v. United Saw, File & Steel Products Workers*, 333 F.2d 596, 602 (3d Cir. 1964) ("[a]rbitrator was unjustified in deviating from the plain mandate" of contract).

Thus, the Third Circuit's approach to the question presented herein clearly does not conflict with the Sixth or Tenth Circuits' decisions relied on by the First Circuit below. And yet the Third Circuit is one of the circuits upon which Petitioner principally relies to illustrate the existence of a conflict worthy of this Court's attention.

The Fifth, Seventh and Eighth Circuits also agree with the premise underlying the First Circuit's decision, namely, that an arbitrator may interpret ambiguous language but may not disregard or modify plain and unambiguous contract language. App. 18a. For example, the Seventh Circuit has cited approvingly the Sixth Circuit decision in *Morgan Services*, 724 F.2d 1217, 1222-24, for the proposition that "the arbitrator may not modify the contract unless authorized to do so." *Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 186 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1184 (1986); *see also Young Radiator Co. v. Int'l Union, U.A.W.*, 734 F.2d 321, 325 (7th Cir. 1984) (where contract gave employer right to discharge for theft, arbitrator's decision that discharge was proper only if theft was "motivating cause" for discharge did not draw its essence from contract); *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1421

(8th Cir. 1986), *reh. denied*, 817 F.2d 1333 (8th Cir. 1987) (*citing with approval* Tenth Circuit decision in *Kerr-McGee* and Sixth Circuit decision in *Detroit Coil Co. v. I.A.M.*, 594 F.2d 575 (1979)); *St. Louis Theatrical Co. v. St. Louis Theatrical Bhd., Local 6*, 715 F.2d 405, 409 (8th Cir. 1983) (arbitrator exceeded authority by balancing equities of company's discipline where "agreement [was] not susceptible to a construction beyond its plain meaning"); *Truck Drivers & Helpers Union, Local 784 v. Ulry-Talbert Co.*, 330 F.2d 562, 566 (8th Cir. 1964) (where clear intendment of contract was that, in event of discharge, arbitrator would not substitute his judgment for that of employer, arbitrator exceeded authority by reducing penalty after finding employee guilty of acts charged); *Teamsters, Local 657 v. Stanley Structures, Inc.*, 735 F.2d 903, 905 (5th Cir. 1984) ("arbitrator may not disregard or modify plain and unambiguous provisions of the agreement") (*citing with approval Storer Broadcasting Co. v. Am. Fed'n of Television & Radio Artists*, 600 F.2d 45, 47 (6th Cir. 1979), *cert. denied*, 454 U.S. 1099 (1981)).

In short, there is no conflict among the circuit courts of appeals on the fundamental point that an arbitrator may not refuse to uphold, on fairness grounds, the discharge of an employee once the arbitrator finds facts clearly constituting grounds for discharge under the bargaining agreement. Because the First Circuit did no more than apply this elemental principle, the petition should be denied.

B. THIS CASE RAISES NO IMPORTANT QUESTION OF FEDERAL LAW.

The First Circuit's holding that the arbitrator exceeded her authority by entering the domain of the pro-

priety of the penalty raises no important question of federal law. Rather, the court merely followed the doctrines of the *Steelworkers Trilogy* and applied them to the particular facts at hand.

The First Circuit premised its decision on the well-established principle that, although arbitrators are to be given great latitude in interpreting collective bargaining agreements, judicial deference to arbitral awards is not absolute. *See AT & T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, —, 106 S. Ct. 1415, 1418 (1986) (whether bargaining agreement creates duty to arbitrate a particular question is "undeniably an issue for judicial determination"). Specifically, arbitrators may not dispense their own brand of industrial justice but are confined to the interpretation and application of the parties' bargaining agreement; "all arbitration awards must draw their essence from the collective bargaining agreement." App. 5a, *citing United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). By ignoring such provisions and substituting her own view of the appropriate penalty for that of the Company, the arbitrator exceeded her authority, and her award failed to draw its essence from the bargaining agreement.

It is clear, under the *Steelworkers Trilogy*, that an award does not "draw its essence from" a contract when such an award abandons the contract in favor of the arbitrator's own agenda for industrial justice. *Enterprise Wheel & Car*, 363 U.S. at 597. Far from undermining the *Steelworkers Trilogy*, the First Circuit decision simply applies its teachings. Thus, neither this case nor any other

First Circuit decision[4] threatens or even questions the important principles set forth in the *Steelworkers Trilogy*. On the contrary, applying an extremely deferential standard of review to arbitral awards, it has consistently enforced the awards of arbitrators who have confined themselves to the interpretation and application of the bargaining agreement.[5]

Of course, different cases applying the *Steelworkers Trilogy* necessarily produce varying results both among the circuits and within each circuit. These differences, however, are caused, not by any fundamental disagreement as to the standard of judicial review of arbitral awards, but by factual differences, such as differences in the particular contracts involved and in arbitral factual findings as to whether the employee engaged in the misconduct alleged. *Compare, e.g., Fabricut, Inc. v. Tulsa General Drivers, Warehousemen & Helpers, Local 523*, 597

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[4]*See, e.g., Posadas de Puerto Rico Assoc., Inc. v. Asociacion de Empleados de Casino de Puerto Rico*, 821 F.2d 60, 61 (1st Cir. 1987) (lamenting the "exasperating frequency" with which meritless challenges to arbitral awards are brought, court awarded double costs to appellee); *Bechtel Constr., Inc. v. Laborers' Int'l Union*, 812 F.2d 750 (1st Cir. 1987); *Int'l Bhd. of Firemen & Oilers, Local 261 v. Great Northern Paper Co.*, 765 F.2d 295 (1st Cir. 1985); *Trustees of Boston Univ. v. Boston Univ. Chapter, Am. Ass'n of Univ. Professors*, 746 F.2d 924 (1st Cir. 1984).

[5]Furthermore, Petitioner is inaccurate in its attempt to show the Court that there is a growing trend at the federal appellate level to overturn or vacate arbitral awards. Contrary to footnote 10 on page 19 of the Petition for Writ of Certiorari, among labor arbitration cases decided by the circuit courts of appeals, there has been, in fact, a significant *decline* in the percentage of arbitral awards being overturned: our reading of the confusing source relied on by Petitioner reflected a 37.8% vacate rate from 1971-1975 but only a 26.1% vacate rate from 1981-1985.

F.2d 227 (10th Cir. 1979) *and Industrial Mutual Ass'n v. Amalgamated Workers, Local 383,* 725 F.2d 406 (6th Cir. 1984) *with Mistletoe Express Service v. Motor Expressmen's Union,* 566 F.2d 692 (10th Cir. 1977) *and Local 342, U.A.W. v. T.R.W., Inc.,* 402 F.2d 727 (6th Cir. 1968), *cert. denied,* 395 U.S. 910 (1969).

Thus, the question in any given case is whether a court was correct in concluding, based on the facts before it, that the award did or did not draw its essence from the contract. That each case necessarily turns on the specific agreement and factual findings involved would explain why this Court has routinely decined to review such cases, regardless of whether the arbitral award, in the particular case, was confirmed or vacated.[6]

This case, too, turns on the specific agreement negotiated by the local unit of production workers and the Company, as well as on the arbitrator's findings that the

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[6]*See, e.g., Teamsters, Local 863 v. Jersey Coast Egg Producers,* 773 F.2d 530 (3d Cir. 1985), *cert. denied,* 106 S. Ct. 1468 (1986); *Ethyl Corp. v. United Steelworkers,* 768 F.2d 180 (7th Cir. 1985), *cert. denied,* 106 S. Ct. 1184 (1986); *Manhattan Coffee Co. v. Int'l Bhd. of Teamsters, Local 688,* 743 F.2d 621 (8th Cir. 1984), *cert. denied,* 471 U.S. 1100 (1985); *Super Tire Eng. Co. v. Teamsters, Local 676,* 721 F.2d 121 (3d Cir. 1983), *cert. denied,* 469 U.S. 817 (1984); *Sears, Roebuck & Co. v. Teamsters, Local 243,* 683 F.2d 154 (6th Cir. 1982), *cert. denied* 460 U.S. 1023 (1983); *Arco Polymers, Inc. v. Local 8-74,* 671 F.2d 752 (3d Cir.), *cert. denied,* 459 U.S. 828 (1982); *F. W. Woolworth Co. v. Miscellaneous Warehousemen's Union,* 629 F.2d 1204 (7th Cir. 1980), *cert. denied,* 451 U.S. 937 (1981); *Storer Broadcasting Co. v. Am. Fed'n of Television & Radio Artists,* 600 F.2d 45 (6th Cir. 1979), *cert. denied,* 454 U.S. 1099 (1981); *Detroit Coil Co. v. Int'l Ass'n of Mach. & Aerosp. Workers,* 594 F.2d 575 (6th Cir.), *cert. denied,* 444 U.S. 840 (1979); *Amoco Oil Co. v. Oil, Chemical & Atomic Workers Int'l Union,* 548 F.2d 1288 (7th Cir.), *cert. denied,* 431 U.S. 905 (1977); *Local 342, U.A.W. v. T.R.W., Inc.,* 402 F.2d 727 (6th Cir. 1968), *cert. denied,* 345 U.S. 910 (1969).

grievants were guilty of the acts alleged and that, *under the contract,* the Company reserved the discretion to discharge for such acts. Under the terms of that agreement, the parties removed from arbitral consideration the question of the appropriate or just penalty for possessing, selling or using marijuana on mill property. The arbitrator's conclusion that she was free to assess the equities of the discharge decisions simply was not based on, and did not draw its essence from, the contract.

In sum, the decision below presents no issues demanding the attention of this Court. This case involves no important constitutional issue or undecided statutory issue. Instead, the case reflects the First Circuit's application of the long-standing teaching that a federal court must refuse enforcement of an award by an arbitrator who does not "confine [herself] to interpretation and application of the collective bargaining agreement." *Enterprise Wheel & Car,* 363 U.S. 593, 597 (1960).

C. THE PENDING MISCO CASE IS NOT A REASON TO GRANT CERTIORARI IN THIS CASE.

As Petitioner notes, one reason the First Circuit reversed the district court decision was that the arbitrator's award violated the public policy against drugs in the workplace. This Court has this term granted certiorari and heard oral argument in a case involving nearly identical facts and issues of public policy. *Misco, Inc. v. United Paperworkers Int'l Union,* 768 F.2d 739 (5th Cir. 1985), *cert. granted,* 107 S. Ct. 871 (1986) (No. 86-651). The pendency of the *Misco* decision suggests, if anything, the propriety of this Court postponing a decision to grant certiorari on the public policy question until it renders a decision in the *Misco* case.

If this Court affirms the Fifth Circuit decision, there will be no need for the Court to review the instant case because one of the grounds on which the circuit decision rests shall already have been sustained by the Court. Moreover, even if this Court reverses the Fifth Circuit's *Misco* decision, there is no reason to review this case because, as demonstrated above, the other ground upon which the First Circuit reversed the district court decision presents no important question of federal law or conflict with the other circuit courts of appeals, but, rather, merely reflects proper application of a universally accepted principle of labor law to a specific labor agreement.

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CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit be denied.

DATED: November 10, 1987

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-583

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,
Petitioner,

v.

S. D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONER

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® 60

TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:

Dobbs Inc. v. Teamsters Local 614, 813 F.2d 85 (6th Cir. 1987)	5
Ethyl Corp. v. Steelworkers, 768 F.2d 180 (7th Cir. 1985)	5
H.K. Porter Co. v. United Saw File & Steel Products Workers, 333 F.2d 596 (3d Cir. 1964)	6
Kane Gas Light & Heating Co. v. Electrical Workers Local 112, 687 F.2d 673 (3d Cir. 1982)	4, 6
Sears, Roebuck & Co. v. Teamsters Local 243, 683 F.2d 154 (6th Cir. 1982)	5
Steelworkers v. Enterprise Wheel, 363 U.S. 593 (1960)	passim
Teamsters Local 657 v. Stanley Structures, Inc., 735 F.2d 903 (5th Cir. 1984)	6-7
Trailways Lines, Inc. v. Trailways Joint Council, 807 F.2d 1416 (8th Cir. 1986)	7
United Paperworkers v. Misco, No. 86-651	1
W. R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983)	2

MISCELLANEOUS:

Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 Colum. L. Rev. 267 (1980)	2-3

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OCTOBER TERM, 1987

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S. D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF FOR PETITIONER

Petitioner United Paperworkers International Union, Local 1069 agrees with respondent S.D. Warren Co. that it may be appropriate for the Court to "postpon[e] a decision to grant certiorari" in this case "until [the Court] renders a decision in [No. 86-651, *United Paperworkers v.*] *Misco*." Resp. Br. at 11. But as we proceed to show, respondent is wrong in contending that "if this Court reverses the Fifth Circuit's *Misco* decision, there [would be] no reason to review this case." *Id.* at 12.

A. Respondent seeks to avoid review on the ground that "the question" in this case, as "in any given case" involving review of a labor arbitration award, "is whether a court was correct in concluding, based on the facts before it, that the award did or did not draw its

essence from the contract." Resp. Br. at 10. That commonplace is an inadequate response to our petition.

As Professor Kaden has explained (in an article to which this Court previously has looked for guidance[1]), the "cryptic caveat in [*Steelworkers v.*] *Enterprise Wheel*, [363 U.S. 593, 597 (1960)], that finality [of arbitral awards] turns upon whether the arbitrator has drawn the 'essence' of his award from the agreement" provides "little guidance as to the appropriate standard for judicial review of arbitral awards." Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 Colum. L. Rev. 267, 270 (1980). As a result, the "mission launched" by *The Steelworkers Trilogy* has "foundered in the circuits," *id.*; "[i]n the absence of adequate guidance, the lower courts have had difficulty in formulating and applying standards to determine whether an arbitrator has respected the limits of the authority granted him by the collective bargaining agreement." *Id.* at 267-68. The courts of appeals' "wavering and uncertain pattern" of decisions has created a "demonstrated need" for the Court to "return to the subject" in order "to clarify the reasoned justification for the finality principle, and thus to identify a meaningful standard for judicial review of arbitration awards." *Id.* at 267, 277.

B. In our petition, we reviewed one manifestation of the need for further guidance by this Court in this area: faced with the precise issue posed here, the courts of appeals have split 4 to 3 over whether to enforce arbitral awards of the type rendered by the arbitrator in this case.[2] Respondent claims that "[t]his simply is

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[1] *See W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983).

[2] *See also* Kaden, *supra*, at 271 ("One manifestation of judicial ambivalence toward the finality of arbitral interpretation is the

not the case." Resp. Br. at 5. Yet respondent does not even discuss—let alone attempt to distinguish—the decisions of the Third, Fifth, Seventh and Eighth Circuits which we cited in our petition (at 13-15) even though in each: the contract required just cause for discharge and defined certain conduct as constituting a dischargeable offense; the arbitrator overturned the discharge on the ground that under the contract the offensive conduct could, but need not, constitute cause for discharge; and the appellate court enforced the arbitral award. Respondent's silence with respect to these cases is pregnant with significance.[3]

C. Instead of treating with the cases that are in square conflict with the decision below, respondent instead discusses or cites eight other cases which, according to respondent, prove that the courts of appeals all "agree with the premise underlying the First Circuit's decision" in the instant case. Resp. Br. at 6. But while those cases show that at the most general level all the courts of appeals recognize that they are obligated to apply the *Enterprise Wheel* standard of review, respond-

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continued inconsistency in the response to arbitration awards that find just cause for discipline of an employee but not for discharge").

[3] Respondent's sole comment with respect to the cases on which we relied in our petition to establish the existence of a circuit conflict is that "[*n*]*ot one* of the . . . decisions . . . contains any statement rejecting, or even mildly criticizing, the Sixth and Tenth Circuit decisions [on which the court below relied]; nor do they acknowledge the existence of the conflict suggested by the Union." Resp. Br. at 5. But the test of whether a circuit conflict exists is *not* whether one circuit has chosen to "criticize" another circuit but rather whether two circuits have reached contrary conclusions on a question of law. Respondent does not dispute our showing that the decisions of the four circuits discussed in our petition did in fact, raise the same legal issue presented by the instant case (and by the Sixth and Tenth Circuit cases on which the court below relied), and that the courts have reached diametrically opposite conclusions in these cases.

ents' cases also highlight the divergent understanding of the courts of appeals concerning the meaning of that very general and abstract standard. *See* p. 2 *supra*.[4]

Although respondent pretends otherwise, what the arbitrator did in this case was to conclude, based on extrinsic evidence of the parties' intent (including, most importantly, the parties' past practice), that the collectice bargaining agreement authorizes arbitral review of whether discharge is the appropriate penalty for a particular offense, including an offense listed in the contract as a "cause for discharge." *See* Pet. at 4-6. In holding that this award does not "draw its essence" from the contract, the court below reasoned that an arbitrator's task is solely to " 'construe ambiguous contract language,' " Pet. App. 8a; that an arbitral award cannot stand if it is inconsistent with "the plain meaning of the words that the parties agreed upon," *id.* at 14a; and that it is the court's function to decide, *de novo*, whether contract language has such a "plain meaning." In sum, as the lower court said, "we must examine the award and the judgment below in the light of the contract to see if the contract was unambiguous." *Id.* at 11a.[5] The decisions respondent cites reflect an entirely different understanding of the role of arbitrators and courts, and of the *Enterprise Wheel* standard of review.

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[4] None of the cases respondent cites arose in the same factual context as the instant case and the cases discussed in our petition, and thus none of the decisions can ameliorate the circuit conflict to which we pointed. Indeed, only one of respondent's cases even discusses the enforceability of arbitral awards of the type involved here and in the cases we cited, and the brief discussion in that case of such awards is *obiter dictum*. *See Kane Gas Light & Heating Co. v. Electrical Workers Local 112*, 687 F.2d 673, 680 (3d Cir. 1982) (noting that in the case before the court "no findings of fact were made that would constitute proper cause for discharge" but stating that "an arbitrator's decision should be vacated when the arbitrator finds facts that constitute grounds for discharge under the collective bargaining agreement but . . . refuses to uphold the discharge").

For example, in *Ethyl Corp. v. Steelworkers*, 768 F.2d 180 (7th Cir. 1985), which respondent cites (at 6), the court affirmed an arbitration award granting vacation benefits to employees who were not on the employer's payroll as of December 31st of the year in question, even though the collective bargaining agreement, in terms, extended such benefits only to employees who were on the payroll as of that date; the arbitrator found that the parties had impliedly agreed that this requirement would not apply where the plant was shutdown as of December 31st. Reasoning that "contracts have implied as well as express terms, and the authority of an arbitrator to interpret a collective bargaining contract includes the power to discover such terms," *id.* at 186, the Seventh Circuit enforced the arbitral award, explaining:

> The arbitrator may not modify the contract unless authorized to do so. But despite contrary intimations in [the Sixth Circuit's decision] in *Sears, Roebuck & Co. v. Teamsters Local 243*, 683 F.2d 154, 1565 (6th Cir. 1982), *there is no rule that an arbitrator in order to find an implied condition, must first find the language of the contract to be ambiguous. Although a literal reading of the contract in this case would preclude the implied condition the arbitrator found, he was not obliged to read the contract literally.* [*Id.*; emphasis added] [6]

The Seventh Circuit added: "the reviewing court's function . . . is at an end when it concludes that what the

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[5] As we noted in our petition, this same theory has led the Sixth Circuit to conclude, in a decision roughly contemporaneous with the decision below, that an arbitral award cannot stand if the award "conflicts with express terms of the collective bargaining agreement" or "imposes additional requirements that are not expressly provided in the agreement." *Dobbs Inc. v. Teamsters Local 614*, 813 F.2d 85 (6th Cir. 1987).

[6] Respondent quotes only the first sentence of the passage quoted in text and thus presents *Ethyl Corp.* as standing for the proposition that "the arbitrator may not modify the contract unless authorized to do so." *See* Resp. Br. at 6.

arbitrator did was interpretation of the contract." *Id.* at 187.

Similarly, in *H.K. Porter Co. v. United Saw File & Steel Products Workers*, 333 F.2d 596 (3rd Cir. 1964), which respondent also cites (at 6), the Third Circuit enforced an arbitral award granting pension benefits to employees who had not obtained age 65 as of the time their plant was closed, even though the contract, read literally, afforded pension benefits only to employees who had obtained that age. The arbitrator based his ruling on the past practice under the agreement; the court stated that "these practices formed a source of guidance to which the Arbitrator was authorized to look, in interpreting the eligibility clause of the agreement." *Id.* at 601.[7] *See also* the following cases cited by respondent at pp. 5-7: *Kane Gas Light & Heating Co. v. Electrical Workers Local 112, supra*, 687 F.2d at 678 (enforcing an arbitration award and stating that an award " 'does "draw its essence from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties intention' "); *Teamsters Local 657 v. Stanley Structures Inc.*, 735 F.2d 903, 905 (5th Cir. 1984) (enforcing an award

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[7] At the same time, the court in *H.K. Porter* refused to enforce that portion of the arbitral award extending benefits to employees who had less than twenty-five years of service, as the agreement, in terms, required that amount of service to qualify for a pension and there was no evidence of past practice to support the arbitrator's award in this regard. The court stated:

> *Bereft of any practice evidencing a relaxation of the requirement of years of total service* . . . the Arbitrator was unjustified in deviating from the plain mandate of the eligibility clause. [333 F.2d at 602; emphasis added]

Respondent omits the underscored words in quoting from the opinion in *H.K. Porter* and thus presents the case as one faulting an arbitrator for " 'deviating from the plain mandate' of contract." Resp. Br. at 6.

and stating that "an award should be enforced so long as it has a basis that is 'rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement' "); and *Trailway Lines, Inc. v. Trailways Joint Council*, 807 F.2d 1416, 1423 (8th Cir. 1986), (overturning an arbitral award in part because "by ignoring the Company's past practice . . . [the arbitrator] ignored an extremely relevant source of . . . law—the law of the shop").

Thus, the very decisions respondents cites make clear that at least the Third, Seventh and Eighth Circuits do not agree with the court below (and those courts with which the court below is allied) that collective bargaining agreements must be read in a dryly literal fashion, and that at least the Third, Fifth and Seventh Circuits have refused to arrogate to themselves the authority to decide whether a collective bargaining agreement is ambiguous. These decisions thus confirm Professor Kaden's observation:

> Justice Douglas' encomium to arbitration in the *Steelworkers* decisions should have been the beginning, not the end, of the development of the theory of the relationship between judges and arbitrators. . . . The *Steelworkers* opinions made an important, even historic, start, but they should have been followed after a time by further efforts to elaborate a theory of national labor policy applicable to collective bargaining agreements. [Kaden, *supra*, 80 Colum. L. Rev. at 276-77]

CONCLUSION

For the foregoing reasons, and those stated in our petition, the Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

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